Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES; HISTORIC PRESERVATION LEAGUE, INC.; AND PRESERVATION TEXAS, INC.

*Petitioners,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity as an Instrumentality of the United States,

*Respondent,*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I. Did the District of Columbia Circuit Court of Appeals, in a decision explicitly conflicting with decisions of the Fifth and Third Circuit Courts of Appeals, err in concluding that the Federal Deposit Insurance Corporation ("FDIC") could not be sued for injunctive or declaratory relief for violating the National Historic Preservation Act, 16 U.S.C. §§ 470f, 470h-2?

II. Did the District of Columbia Circuit Court of Appeals fail to follow this Court's decisions in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), and *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974), when the Court of Appeals held that 12 U.S.C. § 1821(j) precludes the federal courts from considering claims for injunctive or declaratory relief against the FDIC for violating the National Historic Preservation Act, even where a plaintiff has no alternative administrative or civil remedy against the FDIC?

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## LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit are as follows:

Federal Deposit Insurance Corporation

Andrew C. Hove, Jr., in his official capacity as Acting Chairman of the Federal Deposit Insurance Corporation

National Trust for Historic Preservation in the United States

Historic Preservation League, Inc.

Preservation Texas, Inc.

There are no parent or subsidiary companies to be listed pursuant to Rule 29.1 of the Rules of the United States Supreme Court.

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FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity as an Instrumentality of the United States,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Trust for Historic Preservation in the United States, the Historic Preservation League, Inc., and Preservation Texas, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The April 22, 1994, opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 21 F.3d 469 (D.C. Cir. 1994), and is reprinted in the Petitioners' Appendix at Appendix A. The prior per curiam opinion of the Court of Appeals, dated May 28, 1993, denying an emergency motion for stay pending appeal, is reported at 995 F.2d 238 (D.C. Cir. 1993), and is reprinted at Appendix B. The October 21, 1993, per curiam order of the Court of Appeals granting rehearing, and vacating its opinion of May 28, 1993, is reported at 5 F.3d 567 (D.C. Cir. 1993), and is reprinted at Appendix C. The order

of the United States District Court for the District of Columbia (Judge Harold Greene), denying the plaintiffs' motion for preliminary injunction on May 14, 1993, is unreported. The May 14, 1993, order is reprinted at Appendix D. The order of the United States District Court for the District of Columbia (Judge Oberdorfer), granting the plaintiffs' motion for a temporary restraining order on May 7, 1993, is unreported. The May 7, 1993, order is reprinted at Appendix E.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 22, 1994. An extension was granted by Chief Justice Rehnquist on June 17, 1994, extending the time within which a petition for certiorari must be filed until August 20, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1345 and 12 U.S.C. § 1819.

## STATUTES AND REGULATIONS INVOLVED

National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470f, 470h-2 (1992)

Financial Institutions Reform Recovery and Enforcement Act (FIRREA), 12 U.S.C. §§ 1821(j), 1821(d)(13)(D), 1823(d)(3)(A) (1989)

36 C.F.R. Part 800 (1987) (Advisory Council on Historic Preservation regulations)

The statutory and federal regulatory provisions involved are reprinted at Appendix F.

## STATEMENT OF THE CASE

This case presents the important and unsettled question of whether Congress intended to immunize the Federal Deposit

Insurance Corporation ("FDIC") from judicial restraint for alleged violations of federal law, where no alternative remedy is available, and where a denial of equitable and declaratory relief would completely preclude judicial review of the FDIC's actions. The United States Court of Appeals for the District of Columbia Circuit has ruled that 12 U.S.C. § 1821(j)[1] "does indeed" impose an absolute bar to equitable relief against the FDIC.

The petitioners' claim is based on the FDIC's violation of the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470f, 470h-2(a)—a claim that can only be enforced by equitable and declaratory relief—in that the FDIC sold a historic building to a developer and authorized demolition of the building, without prior compliance with the historic review requirements of the NHPA.

There is no dispute that the FDIC, which acquired the historic building in its corporate capacity, failed to comply with the NHPA prior to conveying the building. The question raised by this case is whether Congress, in barring the courts from acting to "restrain or affect" the FDIC's exercise of its receivership powers or functions, under 12 U.S.C. § 1821(j), also intended to bar clearly meritorious claims against the FDIC, acting in its corporate capacity, for which no alternative remedy is available.[2]

The Court of Appeals' decision has serious implications for a wide variety of environmental, public health, and criminal

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[1] Section 1821(j) provides that "[e]xcept as provided in this section, no court may take any action * * * to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 12 U.S.C. § 1821(j).

[2] In no way does § 1821(j) repeal by implication either the mandates of the NHPA that govern federal agencies or the right to file suit to enforce the NHPA. *Cf. Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974) ("If the two statutes are capable of coexistence: it is the courts' duty to regard each as effective, absent a clearly expressed congressional intention to the contrary"). Thus it cannot be presumed that Congress suspended the provisions of the NHPA by implication in enacting § 1821(j), since Congress gave no expression of any intent to do so.

policies, all of which rely for enforcement on the ability of the courts to "restrain or affect" agency action through equitable and declaratory relief, rather than on monetary damages. Because the decision of the District of Columbia Circuit conflicts with decisions by the Fifth and Third Circuits in *Sierra Club, Lone Star Chapter* v. *Federal Deposit Insurance Corp.*, 992 F.2d 545 (5th Cir. 1993), and *Rosa* v. *Resolution Trust Corp.*, 938 F.2d 383 (3d Cir.), *cert. denied*, 112 S. Ct. 582 (1991), and fails to follow this Court's ruling in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), review by this Court is necessary to clarify this unsettled issue.

**A. Statutory Background**

The National Historic Preservation Act ("NHPA") was enacted by Congress in 1966, and amended in 1980 and 1992, to implement a broad national policy encouraging the preservation and protection of America's historic and cultural resources. *See* 16 U.S.C. §§ 470(b), 470-1. Section 106 of the NHPA requires all federal agencies to take into account the effects of their actions on historic properties, and to afford the Advisory Council on Historic Preservation—the independent federal agency created by Congress to implement and enforce the NHPA—a reasonable opportunity to comment on the undertaking. *Id.* § 470f.

The mandate of Section 106 is implemented through a review and consultation process in which federal agencies must seek ways to avoid or mitigate the adverse effects of their actions, in consultation with the Advisory Council and the appropriate State Historic Preservation Officer. The regulations of the Advisory Council setting forth the process, 36 C.F.R. Part 800, "govern the implementation of [Section 106] *in its entirety.*" *Id.* § 470s (emphasis added).

When a federal agency owns or has jurisdiction over a historic property, as in this case, the NHPA imposes additional responsibilities on the agency to "assume responsibility for the preservation of historic properties which are owned or controlled by such agency," *id.* § 470h-2(a)(1), and to ensure that historic properties are "managed and maintained in a way that

considers the preservation of their historic, . . . architectural, and cultural values," *id.* § 470h-2(a)(2)(B).

The sale or transfer of a historic property from the federal government to a non-federal owner is deemed an "adverse effect" on the property because the legal protections of federal law would no longer apply. 36 C.F.R. § 800.9(b)(5). However, if the conveyance is made subject to restrictions or conditions that adequately ensure preservation of the property's significant historic features, then the potential adverse effect of the transfer or sale will be avoided. *Id.* § 800.9(c)(3). Accordingly, protective covenants are routinely used to satisfy the requirements of the NHPA when historic properties are sold or transferred to non-federal owners.

The review and consultation requirements of Section 106 are neither burdensome, costly, nor time-consuming. *McMillan Park Committee* v. *National Capital Planning Commission*, 759 F. Supp. 908 (D.D.C. 1991), *rev'd on other grounds*, 968 F.2d 1283 (D.C. Cir. 1992). Section 106 is merely a "stop, look, and listen" provision. *Illinois Commerce Commission* v. *ICC*, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989). Accordingly, the NHPA does not command that historic preservation concerns be elevated above other agency concerns, but provides a useful mechanism for properly integrating historic preservation concerns into an agency's overall programs and priorities.[3] Private parties may bring suit to enforce the NHPA under 16 U.S.C. § 470w-4.

**B. Factual Background**

The Dr. Pepper Headquarters Building, located in Dallas, is considered one of the finest surviving examples of Art Moderne design in the State of Texas. On March 15, 1993, the

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[3] In fact, the Resolution Trust Corporation, unlike the FDIC, has entered into a Memorandum of Agreement with the Advisory Council on Historic Preservation to address historic preservation issues under the NHPA that are raised by the disposition of assets from failed financial institutions.

Building was determined eligible for listing in the National Register of Historic Places.

On November 30, 1991, the FDIC, acting in its corporate capacity, acquired the Dr. Pepper Headquarters Building, along with the surrounding property, from NationsBank of Texas, which had acquired the Dr. Pepper Building earlier in the year through foreclosure on a deed of trust. Appendix before the Court of Appeals ("App.") (a copy of which has been lodged with the Clerk of the Court) at 16-20, 44.[4]

On March 11, 1993, the FDIC entered into a contract to sell the Dr. Pepper Headquarters Building to DalMac Investment Corporation. App. at 40. Closing was scheduled for May 10, 1993. Four days after signing the contract, and after the Dallas Landmark Commission had given public notice of a hearing to consider designating the building as a landmark, the FDIC authorized DalMac, through a power of attorney, to apply for a permit from the City of Dallas to demolish the Dr. Pepper Headquarters Building and build a strip shopping mall. App. at 21-22.

Two weeks later, on March 30, 1993, the Texas Historical Commission, the state agency charged with assisting federal agencies in carrying out historic preservation responsibilities

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[4] The Dr. Pepper Headquarters Building was subject to a 1985 deed of trust in favor of First Republic Bank Dallas. App. at 37. On July 29, 1988, the Comptroller of the Currency declared First Republic insolvent and appointed the FDIC as receiver. App. at 43. The FDIC then transferred the assets of First Republic, including the deed of trust to the Dr. Pepper Building, to JRB Bank, later known as NCNB Texas National Bank. App. at 43. On November 22, 1988, the FDIC in its corporate capacity agreed to provide financial assistance to NCNB Texas National Bank and to purchase certain of those transferred assets. App. at 43-44. On March 5 and September 3, 1991, the NCNB Texas National Bank foreclosed on the deed of trust covering the Dr. Pepper Building and placed the Building into the pool of assets that the bank had an option to sell to the FDIC. App. at 38. On November 30, 1991, the NCNB Texas National Bank, then known as NationsBank of Texas, deeded to the FDIC, in its corporate capacity, the Dr. Pepper Headquarters Building and the property on which it sits. App. at 16-20, 44.

under the NHPA, notified the FDIC that demolition or sale of the National Register-eligible Dr. Pepper Headquarters Building would require compliance with Sections 106 and 110 of the NHPA, 16 U.S.C. §§ 470f, 470h-2. App. at 23.

The federal Advisory Council on Historic Preservation also informed the FDIC, on April 2, 1993, that the FDIC must comply with the NHPA before selling the Dr. Pepper Building or authorizing any action that would adversely affect the Building. App. at 28-29. The Advisory Council warned the FDIC that failure to comply with the NHPA "would leave the FDIC open to litigation likely to result in injunctive relief to prevent the consummation of the sale" to DalMac.

In response to the Advisory Council and the Texas Historical Commission, the FDIC asserted that it is not a federal agency, and that the NHPA does not apply to the FDIC when it liquidates the assets of failed financial institutions, even where the FDIC is acting in its corporate capacity with respect to property it owns. App. at 30-34.

**C. Proceedings Below**

Petitioners, the National Trust for Historic Preservation in the United States, the Historic Preservation League, Inc., and Preservation Texas, Inc. (hereinafter collectively referred to as the "National Trust"), sued the FDIC on May 3, 1993, in the United States District Court for the District of Columbia, to enjoin the FDIC from selling and authorizing the demolition of the historic Dr. Pepper Headquarters Building without first complying with the National Historic Preservation Act, 16 U.S.C. §§ 470f, 470h-2. The National Trust also sought a declaratory order that the FDIC must comply with the NHPA when the FDIC sells historic properties it has acquired from the assets of a failed bank.

On May 7, 1993, the district court granted a temporary restraining order enjoining the FDIC from selling, demolishing or otherwise disposing of the Dr. Pepper Headquarters Building without complying with the NHPA. However, on May 14, 1993, a

different district court judge denied the National Trust's motion for a preliminary injunction, and dismissed the suit for lack of jurisdiction. While the district court stated that the National Trust was likely to succeed on the merits of its claim that the FDIC had violated the NHPA,[5] it held that, under 12 U.S.C. § 1821(j), the court had no jurisdiction over the National Trust's claims for injunctive or declaratory relief.

On appeal, the National Trust sought an emergency stay from the District of Columbia Circuit. The Circuit denied the National Trust's motion for a stay on May 28, 1993, and affirmed the district court's dismissal of the case for lack of jurisdiction. 995 F.2d 238 (D.C. Cir. 1993). The National Trust immediately filed a petition for rehearing and suggestion for hearing or rehearing en banc. On October 21, 1993, the panel entered an order granting the petition for rehearing, vacating its May 28, 1993 decision, and setting the National Trust's appeal for briefing and argument. 5 F.3d 567 (D.C. Cir. 1993).

On April 22, 1994, the Court of Appeals panel issued three separate opinions,[6] 21 F.3d 469 (D.C. Cir. 1994), which had the effect of reinstating the original May 28, 1993 panel opinion, with the exception of one footnote, 995 F.2d at 239 n.1, in which the Court of Appeals had attempted to distinguish this Court's decision in *South Carolina* v. *Regan*, 465 U.S. 367 (1984).[7]

The Court of Appeals held that 12 U.S.C. § 1821(j) bars any court from exercising jurisdiction over the National Trust's claims for injunctive and declaratory relief under the NHPA, even though the Court recognized that the result will deprive the

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[5] In fact, *both* district court judges in this case concluded that the National Trust was likely to succeed on the merits of its claim that the FDIC is a federal agency required to comply with the NHPA. *See* Appendix D-1, E-6.

[6] The court issued a per curiam opinion, a concurring opinion by Judge Wald, in which Judge Silberman joined, and a separate concurring opinion by Judge Randolph. 21 F.3d 469 (D.C. Cir. 1994).

[7] Instead, the Court of Appeals' analysis of *Regan* "is now controlled by Judge Wald's concurrence." 21 F.3d at 470.

National Trust of any possible remedy to enforce federal historic preservation laws by challenging the FDIC's failure to comply with the NHPA.

The panel majority's concurring opinion recognized that the result of the FDIC's claim of immunity under § 1821(j) from any action for injunctive relief was "sufficiently 'odd' so as to oblige [the court] to 'search for other evidence of congressional intent to lend the term its proper scope.'" 21 F.3d at 472 (quoting *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 454 (1989)).[8] After reviewing the legislative history of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), the panel majority determined that, unlike the Tax Anti-Injunction Act at issue in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), § 1821(j) was not passed "in the 'context of a statutory scheme that provided an alternative remedy' . . . for any and all misfeasance by the liquidating agency," 21 F.3d at 472 (quoting *Regan*, 465 U.S. at 373). The panel therefore concluded that § 1821(j) "does indeed bar" actions by parties, such as the National Trust, who do not have access to an alternative remedy. *Id.*[9]

Petitioners now seek certiorari review of this action, pursuant to 28 U.S.C. § 1254(1), on the grounds that the decision of the District of Columbia Circuit has created an irreconcilable

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[8] The panel majority concluded that the result was "odd" based on the recognition that, under the Court of Appeals' interpretation, courts would be powerless to restrain *any* unlawful action by the FDIC, including even criminal conduct, such as "sell[ing] crack cocaine in an effort to liquidate assets discovered in an unclaimed safety deposit box," or actions that may threaten serious public health or environmental damage, such as unlawful operation of a hazardous waste facility. 21 F.3d at 471-472.

[9] The panel majority also pointed out that "of course, we do not decide today what might happen if the denial of an injunction in any particular situation itself violated constitutional due process." 21 F.3d at 473 (citing *Regan*, 465 U.S. at 375; *id.* at 393-94 (O'Connor, J., concurring in judgment)). Petitioners submit that just such a situation is presented in this case.

conflict with other circuits and significantly departs from the decisions of this Court.

## REASONS FOR GRANTING THE WRIT

### I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS OVER A SIGNIFICANT ISSUE AFFECTING THE ENFORCEMENT OF FEDERAL ENVIRONMENTAL LAWS

The result reached by the District of Columbia Circuit is in conflict with the decisions of other circuit courts of appeal, because for the first time a court has applied § 1821(j) to bar jurisdiction to enjoin the FDIC's actions in a context where the court recognized that the plaintiffs had no alternative remedy. The Court of Appeals acknowledged the direct conflict between its decision and the Fifth Circuit's interpretation of the scope of § 1821(j) in *Sierra Club, Lone Star Chapter* v. *FDIC*, 992 F.2d 545, 550 (5th Cir. 1993). The panel simply concluded: "we do not agree" with the Fifth Circuit. 21 F.3d at 470.

In *Sierra Club*, the Fifth Circuit held that § 1821(j) should not bar injunctive relief against the FDIC acting in its corporate capacity where the application of § 1821(j) would operate as a complete preclusion of judicial review. *Sierra Club* arose under the National Environmental Policy Act ("NEPA"), the NHPA's environmental protection counterpart. The Sierra Club had sought to enjoin the FDIC's sale of a 12,500-acre tract of environmentally sensitive wetlands in South Texas, because the FDIC failed to consider the environmental impact of the sale.

The Fifth Circuit held that the district court *did* have jurisdiction to enjoin the sale, because there was no policy reason to justify the application of § 1821(j). *Id.* at 550-51. In support of its interpretation of § 1821(j), the Fifth Circuit pointed to the fact that Congress had not "clearly and unambiguously" limited the court's equity jurisdiction over claims for which the only effective remedy is injunctive relief. *Sierra Club*, 992 F.2d at 548, 550.

In *Rosa* v. *Resolution Trust Corp.*, 938 F.2d 383, 395 (3d Cir.), *cert. denied*, 112 S. Ct. 582 (1991), the Third Circuit reached the same conclusion—that the scope of § 1821(j) is limited, and that "where Congress has provided plaintiff with no alternative remedy," the statute does not bar injunctions restraining or affecting the RTC's exercise of receivership powers[10] with respect to non-monetary claims.[11] 938 F.2d at 400 (citing *South Carolina* v. *Regan*, 465 U.S. 367, 378 (1984); *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962)). That is precisely the situation in which the petitioners find themselves—with no alternative remedy—since monetary damages would not replace a demolished historic building or otherwise redress the FDIC's failure to comply with the NHPA.

Other courts have also rejected the argument, adopted by the District of Columbia Circuit, that § 1821(j) precludes judicial review in all cases, because such an interpretation would clothe the FDIC with a sweeping immunity from the enforcement of federal laws. "Section 1821(j) does not elevate the FDIC to the position of a sacred cow which may graze upon the rights of others at will, unchecked by the courts." *Cummings Property Management, Inc.* v. *FDIC*, 786 F. Supp. 144, 146 (D. Mass. 1992).[12] Indeed, in every other case in which § 1821(j) has been

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[10] The administrative claims procedures in 12 U.S.C. § 1821 apply to both the RTC and the FDIC. Thus opinions that discuss their application to the RTC may be cited as precedent for the FDIC. The RTC conceded in *Rosa* that § 1821(j) does not act as a bar to relief when the RTC acts in its corporate capacity. 938 F.2d at 393 n.14, 400.

[11] Although the Third Circuit in *Rosa* held that the district court had erred in enjoining the retroactive termination of a qualified retirement plan, the court ruled that, in any event, the RTC had not violated the Employee Retirement Income and Security Act of 1974, 29 U.S.C. §§ 1000 et seq.

[12] *See also Texas American Bancshares, Inc.* v. *Clarke*, 740 F. Supp. 1243, 1247-48 (N.D. Tex. 1990), *rev'd on other grounds*, 954 F.2d 329 (5th Cir. 1992) (rejecting FDIC's assertion that § 1821(j) renders its actions unreviewable); *Telematics Int'l, Inc.* v. *NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992) (in applying § 1821(j), "we do not suggest that the FDIC

*(footnote continues)*

applied to bar jurisdiction, the courts have taken pains to point out the availability of an alternative administrative or legal remedy.[13]

The District of Columbia Circuit would cloak the FDIC in immunity precisely where accountability is most needed: where the FDIC is threatening to take action, in violation of federal law, that will result in irreparable injury for which no alternative form of relief is available. Under the Circuit's reasoning, federal courts would not only be powerless to forestall the unlawful destruction of historic or natural resources, but would also be prohibited from restraining unlawful or criminal conduct by the FDIC that may have irreparable consequences for the public health and safety, such as operating a hazardous waste facility in violation of federal regulations. 21 F.3d at 471.[14]

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*(footnote continued)*

enjoys blanket immunity from judicial oversight."). *Cf. Homeland Stores, Inc.* v. *Resolution Trust Corp.*, 17 F.3d 1269, 1274 n.5 (10th Cir. 1994) (§ 1821(d)(13)(D) does not preclude claims relating to RTC management actions; to hold otherwise would raise the specter that an aggrieved party would be denied all judicial review); *In re Colonial Realty*, 980 F.2d 125, 132-33 (2d Cir. 1992).

[13] *See, e.g., Telematics Int'l, Inc.* v. *NEMLC Leasing Corp.*, 967 F.2d at 706 (noting that application of § 1821(j) to Telematics' claim "does not leave parties such as Telematics without recourse," due to the availability of expedited administrative review of claims presented to the FDIC, and judicial review of the resulting administrative determination).

[14] Indeed, the court's holding would allow the FDIC to violate other federal environmental laws as well, including those adopted by Congress after enactment of FIRREA and which were made directly applicable to assets held by the FDIC in its corporate capacity. For example, the FDIC would be free to dispose illegally of coastal barrier properties in the course of managing real property assets acquired from a failed bank even though Congress has expressly required the FDIC to comply with procedures similar to those provided under the NHPA when disposing of such properties. *See* § 10 of the Coastal Barrier Improvement Act of 1990, 12 U.S.C. § 1441a-3(b) (precluding FDIC from transferring any covered property for 90 days to allow governmental agency or qualified organization to seek ways to protect property).

The hazardous waste scenario is no more "unlikely" than the National Trust's NHPA claim. Both are "the exception rather than the rule." 21 F.3d at 473. Thus the Fifth Circuit's interpretation of § 1821(j) would by no means open a floodgate of litigation against the FDIC. However, in these limited circumstances, where an absolute bar on equitable relief would effectively immunize the agency from judicial review, the stakes of the District of Columbia Circuit's interpretation are extremely high.

Accordingly, the District of Columbia Circuit's holding that § 1821(j) acts as a total bar to judicial review of a claim against the FDIC—where the only means of adjudicating such a claim is by an action for injunctive or declaratory relief—creates a direct conflict among the circuits with serious potential consequences, which should be resolved by this Court.

## II. THE DISTRICT OF COLUMBIA CIRCUIT HAS DEPARTED FROM THE HOLDINGS OF THIS COURT.

### A. This Court's Decisions Do Not Permit the Circuit Court to Deprive Petitioners of All Judicial Relief, Absent a Clear Congressional Mandate to Do So.

This Court has "repeatedly acknowledged 'the strong presumption that Congress intends judicial review of administrative action.'" *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988) (quoting *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)). "The presumption in favor of judicial review may be overcome 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent.'" *Traynor*, 485 U.S. at 542 (quoting *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967)). Leaving aggrieved parties with no remedy whatsoever to redress a legitimate injury[15] is too "odd" a result to reach without

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[15] There is no question that the application of § 1821(j) to bar equitable relief in this case would absolutely deprive the National Trust of any remedy for the FDIC's violation of the NHPA, despite Congress's explicit creation of a private right of action in the NHPA, 16 U.S.C. § 470w-4.

*(footnote continues)*

a clear congressional mandate. Accordingly, judicial review will be precluded only where "specific language or specific legislative history" contains "'clear and convincing evidence'" that Congress so intended, in order to avoid violating any due process rights of aggrieved parties. *Traynor*, 485 U.S. at 542.

The effect of the Circuit's decision is to immunize the FDIC from any accountability to the judicial branch for its unlawful actions and to deprive aggrieved parties of any available remedy in violation of the due process clause. *See Bob Jones University* v. *Simon*, 416 U.S. 725 (1974) (rejecting a due process challenge to the Tax Anti-Injunction Act on the ground that the aggrieved party ultimately had access to judicial review). Thus, where an action asserts an injury to a right, including rights created by law, a complete bar to any administrative or judicial review would result in an unconstitutional deprivation of due process since the aggrieved party would never have an opportunity to be heard.[16]

This Court has consistently applied these principles in limiting the scope of statutory restrictions on equity jurisdiction. For example, in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), this Court held that the Tax Anti-Injunction Act was not intended to bar an action where Congress had not provided the plaintiff with an alternative mechanism to challenge the legal validity of a tax. Since the state could not contest the validity of a tax unless a third-party taxpayer volunteered to do so, this Court refused to

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*(footnote continued)*

FIRREA provides no administrative remedy for violations of the NHPA, and the National Trust's injury cannot be remedied through damages. *See WATCH* v. *Harris*, 603 F.2d 310, 312 n.2 (2d Cir. 1979); *Attakai* v. *United States*, 746 F. Supp. 1395 (D. Ariz. 1990); *Save the Courthouse Comm.* v. *Lynn*, 408 F. Supp. 1323, 1342 (S.D.N.Y. 1975); *Boston Waterfront Residents Ass'n* v. *Romney*, 343 F. Supp. 89, 91 (D. Mass. 1972).

[16] *See Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 583-87 (1989); *Logan* v. *Zimmerman Brush*, 455 U.S. 422, 431-33 (1982). *Cf.* Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 69-74 (1981).

apply the broad language of the Anti-Injunction Act to bar the state's suit.[17]

The Court in *Regan* further noted that in *Bob Jones University* v. *Simon*, 416 U.S. at 736, where the Court had relied on the availability of a refund suit to bar the university's suit to enjoin the revocation of its tax-exempt status, the Court had specifically stated that "'our conclusion might well be different' if the aggrieved party had no access to judicial review." 465 U.S. at 375 (quoting *Bob Jones*, 416 U.S. at 746). *See also McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) (jurisdiction-limiting provision of immigration law did not prevent the district court from having jurisdiction); *California* v. *Grace Brethren Church*, 457 U.S. 393, 411 (1982) (Tax Anti-Injunction Act bars declaratory and injunctive relief against state tax collection unless there is "no 'plain, speedy and efficient remedy'" in state courts).

Central to the Court's decisions in *Grace Brethren* and *Regan* was the presence or absence of an alternative remedy. Where none appeared, the Court searched the legislative history for evidence of congressional intent to bar all relief. "Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they" would otherwise have jurisdiction. *Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979).

### B. The District of Columbia Circuit, Unlike the Fifth Circuit, Disregarded This Court's Presumption Against a Complete Preclusion of Judicial Review.

The Court of Appeals in this case—in conflict with at least the Fifth and Third Circuits—has flipped on its head this Court's presumption that limits on equity jurisdiction should not be construed to preclude judicial review. Rather than citing to "clear and convincing" evidence of congressional intent to create

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[17] Not only did the District of Columbia Circuit differ from the Fifth Circuit in its reading of *Regan*, but the members of the panel could not agree among themselves as to the proper effect of this Court's *Regan* holding on the instant case. *Compare* 21 F.3d at 472 (Wald, J. concurring) *with* 21 F.3d at 473 (Randolph, J. concurring) *and with* 995 F.2d at 239 n.1.

such a draconian result, the Circuit reached that conclusion in the face of acknowledged congressional silence. Thus the Court of Appeals failed to comply with this Court's holdings that statutes limiting equity jurisdiction, like § 1821(j), must be narrowly and strictly construed.

There is simply no evidence of any legislative intent that § 1821(j) of FIRREA creates a total bar to injunctive relief by parties who have no alternative remedy. In fact, Judge Wald had previously found only "thundering silence on the part of Congress." 995 F.2d at 243 (Wald, J., dissenting). Moreover, nothing in the circumstances surrounding the enactment of § 1821(j) reveals a purpose to absolutely preclude judicial review of a federal claim which can only be enforced by an equitable action, and no court prior to the decision in this case has so held. Nor is there any other policy reason to apply § 1821(j) in the circumstances presented by this case.

Instead of applying the presumption of reviewability required by this Court—which assumes that Congress meant to afford relief, but looks for clear and convincing evidence of a contrary intent—the panel majority's concurring opinion applied the opposite presumption, creating an unwarranted blanket immunity for the FDIC. That is, instead of looking for clear and convincing evidence of congressional intent to *preclude* all relief, the panel went in search of evidence showing a legislative intent to *afford* relief where no alternative remedy exists. Finding "no evidence" of such an intent, the panel determined, on the basis of congressional silence, to preclude all relief. 21 F.3d at 472. Under this Court's holdings, congressional silence should have dictated the opposite result. Yet, in the absence of legislative history either way, the panel effectively flipped the presumption required by this Court, concluding that § 1821(j) precludes *all* relief, rather than applying the proper presumption that it only precludes equitable relief when an alternative remedy is available.

By contrast, in *Sierra Club* v. *FDIC, supra*, the Fifth Circuit cited this Court's previous decisions in holding that "we must reject the FDIC's argument unless Congress has clearly and

unambiguously limited the court's equity jurisdiction in these statutes." 992 F.2d at 548. The Fifth Circuit carefully reviewed § 1823(d)(3)(A) and noted that the statute "does not speak directly to the equitable jurisdiction of the federal courts" but merely affirms that the FDIC generally has, when acting in its corporate capacity, the powers, privileges, and authorities it enjoys as a receiver. *Id.* at 550. Failing to find "the clarity the Supreme Court requires," the Fifth Circuit concluded:

> We simply cannot assume that a grant of rights and powers to the FDIC, without any reference to the court's power over the FDIC's exercise of those rights and powers, includes a limitation on anything so fundamentally embedded in our system of jurisprudence as the court's equity jurisdiction. Indeed, the court's equity jurisdiction provides an essential safeguard to individual rights against arbitrary government action that cannot be indirectly cast aside.

*Id.* The Fifth Circuit also noted that, since the FDIC in its corporate capacity does not have the same need to "act quickly in volatile situations" as the FDIC does in its receiver capacity, "the policy behind congressional limits on the court's equity jurisdiction supports our conclusion that these statutes do not shield the FDIC from the court's equity jurisdiction" when it acts in its corporate capacity. *Id.*

### C. Congress Did Not Intend § 1821(j) to Preclude Equitable Relief Under the Circumstances of this Case.

Although there is scant legislative history regarding § 1821(j), and certainly nothing that rises to the level of "clear and convincing" evidence of congressional intent to overcome the presumption of judicial review, the evidence that exists supports the Fifth Circuit's interpretation of § 1821(j), not the view of the District of Columbia Circuit in this case.

In adopting FIRREA, Congress established an elaborate administrative process for adjudicating claims against the FDIC and the RTC acting as receiver or conservator, and provided for

limited judicial review of those claims. *See* 12 U.S.C. §§ 1821(d)(3)-(10), 1821(d)(13)(D).[18] The extensive formal claims procedure under § 1821(d) applies only to claims for monetary relief brought by a bank's investors, creditors or depositors, and monetary claims against the receiver. *See* H.R. Rep. No. 54(I), 101st Cong., 1st Sess., pt. 1, at 339 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 130 ("claimants against a failed financial institution are only entitled to their pro rata share of the institution's estate"). The claims process under § 1821(d) is thus designed for claims against insolvent banks and recovery from receivership assets, and not for any non-monetary claims such as the National Trust's.

Section 1821(j) prevents the courts from acting to restrain or affect the FDIC's exercise of receivership powers or functions only in cases where another forum exists for resolving claims that require such relief. Had Congress intended for § 1821(j) to create an absolute preclusion of judicial review for non-monetary claims, particularly where the FDIC was acting in its corporate capacity, it would have used language similar to § 1821(d)(13)(D), which precludes judicial review of monetary claims covered by the FDIC's administrative claims process.[19]

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[18] Congress created two separate provisions in FIRREA limiting judicial review of actions taken by the FDIC and the RTC regarding the assets of failed financial institutions. First, Congress enacted § 1821(d)(13)(D), which precludes all judicial review of claims that are subject to FIRREA's administrative claims process, except for the limited judicial review afforded after the completion of that process. Second, Congress enacted § 1821(j), which limits the court's exercise of certain equitable powers.

[19] Petitioners do not contend that § 1821(j) applies only to claims that are covered by the administrative claims regime of 12 U.S.C. § 1821(d). Rather, § 1821(j) also bars claims for injunctive relief that are *not* subject to the administrative claims regime, but only where an alternative remedy is available (in contrast to this case), such as a remedy at law, or an injunctive remedy against another entity. *See Rosa* v. *RTC*, 938 F.2d at 400 (plaintiffs retained a claim against state banks to stop retroactive termination of pension plan); *Oakville Dev. Corp.* v. *FDIC*, 986 F.2d 611 (1st Cir. 1993) (plaintiff retained redemptive rights under state law following improper

*(footnote continues)*

In fact, the House Committee Report on FIRREA indicates that Congress modelled § 1821(j) on a provision of the Home Owner's Loan Act ("HOLA"), which barred actions that would "restrain or affect" the exercise of the FSLIC's receivership powers or functions. H.R. Rep. No. 54(I), 101st Cong., 1st Sess., pt. 1, at 334 (1989). Thus, § 1821(j) was intended to bar actions against the FDIC only to the same extent that HOLA barred claims against the FSLIC and, most importantly, in the context of a statutory scheme that provides an administrative remedy for most claims.

Congress enacted FIRREA three months after this Court's decision in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 574-75 (1989), which held that Congress did not intend for HOLA to divest the courts of jurisdiction over claims that FSLIC did not have the authority to resolve through its administrative process.[20] This Court also held in *Coit* that, when viewed in context, the provision prohibits untimely challenges to a receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out receivership functions.

The fact that Congress modelled § 1821(j) on HOLA's bar against actions to "restrain or affect" the exercise of receivership

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*(footnote continued)*

foreclosure even though federal suit was precluded). Accordingly, § 1821(j) is not redundant or superfluous of the "ouster of jurisdiction" under § 1821(d)(13)(D)(ii) for claims that are subject to the administrative claims regime of § 1821(d).

[20] In *Coit*, this Court held that the anti-injunction provision of 12 U.S.C. § 1464(d)(6)(C), upon which § 1821(j) was patterned, did not preclude the adjudication of creditor claims against an insolvent savings and loan over which FSLIC had been appointed receiver. The Court pointed out that the adjudication of such claims would not constitute a "restraint" upon the FSLIC any more than judicial review of FSLIC administrative claims. 489 U.S. at 577. Since Congress did not provide any administrative claims procedure in FIRREA for reviewing claims under the NHPA, such claims are reviewable de novo pursuant to *Coit*. *Id.* at 587. Judicial review of the National Trust's claims does not pose any greater restraint on the FDIC than judicial review of creditor claims.

powers indicates that Congress agreed with the Court's interpretation in *Coit*, and likewise intended that § 1821(j) operate as a bar *only* for claims seeking to restrain the FDIC from exercising a receivership function but certainly not a corporate function where there is no alternative remedy.[21] Furthermore, it is clear from the discussion in *Coit*, 489 U.S. at 575-77, that the receivership functions which could not be restrained by a lawsuit involved functions that affect the relationship between the receiver and those who have a monetary interest in the receiver's assets and not the type of functions at issue here.

The only alternative remedy conceivably available to the National Trust is declaratory relief. Accordingly, the court erred when it upheld the dismissal of the National Trust's claim for declaratory relief. The Declaratory Judgment Act, 28 U.S.C. § 2201, "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Green* v. *Mansour*, 474 U.S. 64, 72 (1985) (quoting *Public Service Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952)). The decision whether to grant the declaratory judgment remedy is "informed by the teachings and experience concerning the functions and extent of federal judicial power." *Wycoff*, 344 U.S. at 243. Public policy favors declaratory judgments "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Edwin Borchard, *Declaratory Judgments* 299 (2d. ed. 1941).

Here, two federal district court judges have determined that the FDIC is required to comply with Section 106, and yet the FDIC continues to refuse to comply. A declaratory judgment on the merits of plaintiffs' Section 106 claim would go far in clarifying and settling the legal relations at issue.

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[21] Indeed, the administrative claims process in FIRREA was established to avoid the constitutional concerns raised by this Court in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 574-79 (1989). *See* H.R. Rep. No. 54(I), 101st Cong., 1st Sess., pt. 1, at 418 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 214.

## CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed May 28, 1993

No. 93-5137

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES; HISTORIC PRESERVATION LEAGUE, INC. A NON-PROFIT CORPORATION: HISTORIC PRESERVATION LEAGUE OF DALLAS,

*Appellants*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION; ANDREW C. HOVE, JR., in his official capacity as Acting Chairman, Federal Deposit Insurance Corporation,

*Appellees*

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 93-00904)

Emergency Motion for Stay Pending Appeal

Bills of cost must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*David Armour Doheny, Elizabeth Sherrill Merritt, Andrea C. Ferster,* and *Richard Bart Nettler* were on the motion for stay for appellants.

*Ann Scharnikow DuRoss* and *Jerome A. Madden,* Attorneys, Federal Deposit Insurance Corporation, were on the opposition to the motion for stay.

Before: WALD, RUTH B. GINSBURG and RANDOLPH, *Circuit Judges.*

Opinion for the court filed *Per Curiam.*

Dissenting opinion filed by *Circuit Judge* WALD.

*Per Curiam:* The Federal Deposit Insurance Corporation (FDIC), acting as a liquidator with the powers of a receiver, *see* 12 U.S.C. § 1823(d)(3)(A), is in the process of selling the Dr. Pepper Headquarters Building in Dallas, Texas. The National Trust for Historic Preservation in the United States, the Historic Preservation League, Inc., and the Historic Preservation League of Dallas (collectively, the National Trust), sued to enjoin the transaction on the ground that the FDIC's contemplated sale would violate the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.* The NHPA requires, among other things, that federal agencies "take into account" possible adverse effects of agency "undertakings" on properties included in or eligible to be included in the National Register of Historic Places, and afford the Advisory Council on Historic Preservation "a reasonable opportunity to comment with regard to such undertaking(s)." *See* 16 U.S.C. § 470f. The National Trust alleges that the FDIC is subject to the NHPA's requirements and has unlawfully ignored them in connection with the impending sale of the Dr. Pepper Building. The private buyer of the Dr. Pepper Building, all parties agree, would have no duty to comply with the federal preservation statute after acquiring the property. Once the impending sale is consummated, the National Trust thus will have no judicial or administrative recourse against this alleged violation of federal law by the FDIC.

The district court issued a temporary restraining order barring the sale, *see National Trust for Historic Preservation* v. *FDIC*, No. 93-0904 (D.D.C. May 7, 1993); a week later, the court (acting through a different district judge) denied the National Trust's motion for a preliminary injunction and dismissed the action for lack of jurisdiction, *see id.* (D.D.C. May 14, 1993). In dismissing the action, the district court relied exclusively on 12 U.S.C. § 1821(j). We agree that § 1821(j) bars the National Trust's suit for injunctive relief; accordingly, we deny the National Trust's motion for a stay pending appeal, and affirm the dismissal.

Section 1821(j) states:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

Here, the powers and functions the FDIC is exercising are, by statute, deemed to be those of a receiver. *See* 12 U.S.C. § 1823(d)(3)(A). An injunction against the planned sale would surely "restrain or affect" the FDIC's exercise of those powers or functions. We reject the National Trust's argument that § 1821(j) applies only to claims that are themselves subject to the administrative claims procedures set out in 12 U.S.C. § 1821(d). Section 1821(j) is not so limited.[1]

Nothing in the text of § 1821(j) limits its application to claims brought by creditors or others who have recourse to the

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[1] We recognize that in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), the Supreme Court read into the encompassing language of the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), an exception allowing states to invoke the Court's original jurisdiction to test the constitutionality of a provision of the Tax Equity and Fiscal Responsibility Act of 1982. The Court rested its decision on the "Act's purpose and the circumstances of its enactment," which indicate that "Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." 465 U.S. at 378. In addition to its unique context, the decision can

*(footnote continues)*

administrative claims regime of 12 U.S.C. § 1821(d). *Cf.* 28 U.S.C. § 1341 (explicitly limiting ban on federal injunctions against assessment of state taxes to cases in which there is a "plain, speedy and efficient remedy" in state court). The exclusivity of the FDIC's administrative claims provisions stems from another provision located, as one might expect for an exclusivity-of-remedies provision, directly after the claims procedures prescribed in § 1821(d). That provision, set out in § 1821(d)(13)(D) and entitled "Limitation on Judicial Review," states:

> Except as otherwise provided in this subsection [§ 1821(d)], no court shall have jurisdiction over—
>
> > (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or
> >
> > (ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

It would be plausible, though we need not decide the question here, to read § 1821(d)(13)(D)(ii)'s ouster of jurisdiction as limited to suits otherwise governed by the administrative claims

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*(footnote continued)*

be fully comprehended only in light of Supreme Court doctrine that otherwise insulates the tax collector against suits that would deflect the collector's energies from the collection of taxes. *See e.g., Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

The *South Carolina* v. *Regan* decision does not stand for the proposition that whenever a statute bars injunctive relief, the courts are to ignore the statutory restriction if the plaintiff cannot obtain adequate judicial relief by some other method. Injunctions generally issue when the alternative of a remedy at law is inadequate; preliminary injunctions and stays issue in order to prevent irreparable harm. To hold that the lack of an adequate alternative remedy renders § 1821(j)'s bar against restraining orders inoperative would therefore be tantamount to rendering the provision entirely ineffective.

regime set out in § 1821(d). *See, e.g., Rosa* v. *Resolution Trust Corp.,* 983 F.2d 383, 395 (3d Cir.), *cert. denied,* 112 S. Ct. 582 (1991). It would not be plausible, in light of § 1821(d)(13)(D), however, to read § 1821(j) as a bar only against circumvention of the statutory administrative claims procedures. Such a reading would make the latter provision largely redundant and would overlook Congress's casting of § 1821(j)'s directive in terms, not of precluding claims, but of shielding the FDIC's exercise of its "powers" and "functions."

The National Trust also argues that § 1821(j), which applies to the FDIC when acting "as a conservator or a receiver," is simply inapplicable because the FDIC is acting in its *corporate* capacity. The argument is precluded by 12 U.S.C. § 1823(d)(3)(A), which provides: "With respect to any asset acquired or liability assumed pursuant to this section, the Corporation shall have all of the rights, powers, privileges, and authorities of the Corporation as receiver under section [ ] 1821 . . . of this title." The FDIC acquired the Dr. Pepper Building pursuant to its powers under § 1823; and the FDIC's immunity from judicial "restraint" is among its "rights, powers, privileges, and authorities" under § 1821.[2]

We do not suggest that § 1821(j) precludes courts from granting injunctive relief against the FDIC whenever and however it purports to act as a receiver. By its terms, § 1821(j) shields only "the exercise of *powers or functions*" Congress gave to the FDIC; the provision does not bar injunctive relief when the FDIC has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions. *See Telematics Int'l, Inc.* v. *NEMLC Leasing Corp.,* 967 F.2d 703, 707 (1st Cir. 1992); *Rosa,* 938 F.2d at 399; *see also Coit Independence Joint Venture* v. *Federal Savings & Loan Ins. Corp.,*

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[2] In *Rosa* v. *Resolution Trust Corp.,* 938 F.2d 383, 395 (3d Cir.), *cert denied,* 112 S. Ct. 582 (1991), which stated that § 1821(j) does not apply to the Resolution Trust Corporation (RTC) in its corporate capacity, RTC invoked neither § 1823(d)(3)(A) nor any comparable provision equating corporate action, in the particular setting, to that of a receiver.

489 U.S. 561 (1989). In liquidating assets it has obtained pursuant to 12 U.S.C. § 1823, however, the FDIC is acting squarely within its statutory "powers and functions," and surely not in conflict with any constitutional norm. We do not think it possible, in light of the strong language of § 1821(j), to interpret the FDIC's "powers" and "authorities" to include the limitation that those powers be subject to—and hence enjoinable for non-compliance with—any and all other federal laws. While Congress has included such provisos in some statutes immunizing agency action from outside second-guessing, *see, e.g.,* 5 U.S.C. § 7106(a)(2) (management rights immunized from arbitral review under Federal Labor Relations Act only when exercised "in accordance with applicable laws"), we see no such limitation in § 1821(j).

In disposing of the assets of a bank, the FDIC is performing a routine "receivership" function that § 1821(j) unequivocally removes from judicial restraint. Deciding only the clear case before us, we do not reach further to consider whether § 1821(j) covers every other case a legal mind could conjure. *Cf. Enochs* v. *Williams Packing & Navigation Co.,* 370 U.S. 1, 7 (1962) (recognizing exception to Tax Anti-Injunction Act, 26 U.S.C. § 7421, where tax collector lacks "good faith" claim to tax sought to be collected). The Dr. Pepper Building came into the FDIC's hands only because the building was pledged as collateral on a loan extended by a federally insured financial institution; were it not for the fortuity of that institution's failure, the building would not be even arguably within the jurisdiction of a federal agency. If the contemplated sale to a private party goes through, the building will still be subject to state historic property preservation laws, *see* TEX. LOCAL GOV'T CODE ANN. § 315.006(b)(West 1993) (prohibiting unauthorized destruction of an "historic structure"), just as it would have if it had remained in private hands all along.[3]

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[3] This result is hardly so untoward that one might doubt whether the statute reaches so far. *Cf. South Carolina* v. *Regan,* 465 U.S. at 398-402 (O'Connor, J., concurring in the judgment).

The prohibition against restraining the FDIC, with its unambiguous "No court," applies as much to the courts of appeals as to the district courts. Having determined that § 1821(j) bars the National Trust's suit to enjoin the sale of the Dr. Pepper Building,[4] we deny the application for a stay, and affirm the district court's order dismissing the suit for lack of jurisdiction.

[4] We have considered, in reaching this judgment, the ample written submissions of the parties on the motion to stay before this court and the full presentations before the district court on the motions for a temporary restraining order and a preliminary injunction.

WALD, *Circuit Judge,* dissenting: Even if the majority should ultimately be proven right that 12 U.S.C. § 1821(j) deprives this court of jurisdiction to enjoin the sale and demolition of this historic building that has come under the FDIC's supervision, I believe it is singularly inappropriate to decide a first-time-in-the-circuit issue of such momentous consequences—potentially immunizing an agency from court enforcement of the entire U.S. Code—without the benefit of full briefing and oral argument. Accordingly, I dissent from the denial of the stay, which removes any federal law obstacles to the demolition of the Dr. Pepper Headquarters Building, considered one of the finest examples of Art Moderne architecture in Texas and already determined to be eligible for listing in the National Register of Historic Places.

I do not think the question of a court's jurisdiction to entertain any action against the FDIC, no matter what statute it is violating or in what statutorily authorized capacity it is acting, is as easily resolved as the majority's opinion suggests. While § 1821(j)'s language is unqualified in its breath-taking pronouncement that "no court may take any action," that bar must be read in the context of the statutory scheme as a whole. In *South Carolina* v. *Regan*, 465 U.S. 367 (1984), for example, the Court limited the scope of equally expansive language in the Anti-Injunction Act, 26 U.S.C. § 7421(a),[1] based in part on its location within "a statutory scheme that provided an alternative remedy." *Id.* at 374. Despite the fact that the Act's language "could scarcely be more explicit," *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 736 (1974), the Court concluded that "the Anti-Injunction Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided a remedy." *Regan*, 465 U.S. at 378. Appellants argue here—certainly not frivolously—that §1821(j) must similarly conform to a

[1] That Act provides, in relevant part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 4721(a).

congressional intent to preclude judicial intervention only of claims that can be resolved by the statute's alternative administrative remedy.

The majority, however, disposes of this argument—and of the teachings of *Regan*—in a footnote explaining that this recent and seemingly applicable, if not controlling, Supreme Court precedent "can be fully comprehended only in light of Supreme Court doctrine" aimed at insulating the tax collector from suit. Majority opinion ("Maj. op.") at 3 n.1. The panel's reading of *Regan*, however, reflects only its own comprehension, not the Court's. The *Regan* majority opinion included no language suggesting that the approach it employed—interpreting the anti-injunction provision in light of available indicia of congressional intent—was to be confined to tax cases or was in any way related to a tax collection doctrine. At best, a concurring opinion stated that the Act served this "collateral objective" of protecting the tax collector. *Regan*, 465 U.S. at 387 (O'Connor, J., concurring). Since *Regan* was, after all, a tax case, this passing reference to a tax doctrine seems wholly unremarkable, and certainly a slim reed to support the panel's contention that the *Regan* Court's rationale derived from and was limited to tax cases. To the contrary, the majority distinguished itself from the concurrence by noting its belief that Congress was concerned with providing, as well as limiting, remedies. *Id.* at 376 n.13. In any event, where the Supreme Court has indicated that courts *may*—if not *must*—inquire into and rely on indicia of congressional intent in interpreting an anti-injunction provision, I would have thought this court would feel compelled to at least engage in a full briefing and argument, before rejecting that prescribed approach out-of-hand in a footnote.[2]

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[2] I agree with the majority, *see* Maj. op. at 3 n.1., that *Regan* does not stand for the proposition that an anti-injunction provision can never be applied in the absence of an alternative remedy, whether judicial or administrative. I do read *Regan* to suggest that an anti-injunction provision should not be interpreted in the absence of a considered inquiry—or

*(footnote continues)*

Indeed, in construing the scope of § 1821(j) itself, our sister circuits, like the *Regan* Court, have taken pains to consider the availability of an alternative administrative remedy. The First Circuit, for example, stated:

> Congress did not leave individuals having claims against the institution without a remedy, however. FIREA [Financial Institutions Reform and Recovery Enforcement Act] contains an elaborate administrative system by which the FDIC may adjudicate claims against the insured institution.

*Telematics Int'l, Inc.* v. *NEMLC Leasing Corp.*, 967 F.2d 703, 705 (1st Cir. 1992) (citing 12 U.S.C.A. § 1821(d)(3)(ii) (West 1989 & Supp. 1992)). While the *Telematics* court went on to conclude that the district court did, in fact, lack jurisdiction, its decision was based in part on "the elaborate structure created by FIREA, and the evident intent of Congress that the structure should be permitted to stand with minimal court interference." *Id; see also United Liberty Life Insur. Co.* v. *Ryan*, 985 F.2d 1320, 1329 (6th Cir. 1992) (quoting *Telematics); In re Landmark Land Co. of Oklahoma, Inc.*, 973 F.2d 283, 289 (4th Cir. 1992) ("In FIRREA, Congress established a comprehensive statutory scheme within which the RTC could exercise its broad powers to reorganize and collect assets for the benefit of depositors (and taxpayers)."). [3] Similarly, in construing another provision of FIREA, the Third Circuit expressly concluded that "[w]hatever its breadth, we do not believe that clause (ii) [12 U.S.C.

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*(footnote continued)*

indeed, any inquiry—into the reach Congress intended to give the provision. If the inquiry reveals no congressional concern for the availability of alternative remedies, then clearly the court should not impose such a limitation. My reluctance is to reach that conclusion without adequate consideration of "the circumstances of [the provision's] enactment." *See Regan*, 465 U.S. at 378.

[3] Both the FDIC and the RTC are subject to § 1821(j), and case law applying that provision to one agency is applicable to the other. *See, e.g., In re Colonial Realty*, 980 F.2d 125, 136 (2d Cir. 1992) (applying RTC precedent in case involving FDIC).

§ 1821(d)(13)(D)(ii) ] encompasses claims that are not *susceptible of resolution through the claims procedure." Rosa* v. *Resolution Trust Corp.,* 938 F.2d 383, 394 (3d Cir.), *cert. denied,* 112 S. Ct. 582 (1991) (emphasis added). FIRREA, however, provides no administrative remedies for alleged violations of the National Historic Preservation Act ("NHPA"), or indeed of any other major regulatory statute, including worker safety or environmental protection statutes.

Again rejecting the approach counselled by the *Regan* Court, which interpreted the Anti-Injunction Act with regard to "indicia of congressional intent," *Regan,* 465 U.S. at 381, the majority notes that "[n]othing in the text of § 1821(j) limits its application," Maj. op. at 4, and referring to the "unambiguous" prohibition of that section, *id.* at 6, stops there, declining to look into the legislative history of FIRREA or the circumstances of its enactment. Appellants note, however, that the legislative history of FIRREA provides no hint of such an enormous role for the anti-injunction provision. *See* Reply to the Opposition to Emergency Motion for Stay Pending Appeal, at 6 & n.9. The House Committee Report on FIRREA indicated that it was intended to bar court action only to the same extent as did the existing Home Owners' Loan Act ("HOLA"). H.R. REP. NO. 54, 101st Cong., 1st Sess. 334 (1989); *see also Rosa,* 938 F.2d at 395 (§ 1821 (j) to have same effect as HOLA provision). The committee issued its draft of this legislation shortly after and presumably in light of the Supreme Court's decision in *Coit Independence Joint Venture* v. *Federal Sav. & Loan Insur. Corp.,* 489 U.S. 561 (1989), in which it rejected an expansive interpretation of the HOLA anti-injunction provision. The record before us shows no congressional intent, reflected in the legislative history, to grant the FDIC virtually unprecedented authority to carry out its statutory responsibilities unchecked by any other federal laws and unfettered by any judicial intervention. Putting aside debates on the proper use of legislative history, this thundering silence on the part of Congress surely deserves at least a passing nod before authoritatively pronouncing circuit law on a stay motion. It is a true Sherlock Holmesian example of the dog that did not bark.

There are other reasons counselling a more in-depth inquiry than this stay motion has permitted. First, the majority's conclusion that, tucked away in the middle of FIRREA's detailed discussion of the FDIC's responsibilities in the valuation and distribution of assets and the conduct of liquidation proceedings, Congress bestowed upon the FDIC sweeping immunity from court intervention to enforce the entire body of federal regulatory law, presumably including criminal as well as civil prohibitions, "'compel[s] an odd result,'" such as to take us out of the plain meaning rule. *See Public Citizen* v. *Department of Justice,* 491 U.S. 440, 454 (1989) (quoting *Green* v. *Bock Laundry Mach. Co.,* 490 U.S. 504, 509 (1989)). Moreover, the Supreme Court has not generally limited its inquiry to a literal and unqualified reliance on the plain language of statutes limiting judicial review of administrative action. *See, e.g., McNary* v. *Haitian Refugee Center, Inc.,* 498 U.S. 479 (1991) (giving narrowing construction to broadly worded statutory bar of judicial review of amnesty applications under the Immigration Reform and Control Act of 1986); *Traynor* v. *Turnage,* 485 U.S. 535 (1988) (concluding that a provision barring judicial review of "the decision of the [Veterans' Administration] Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans," 38 U.S.C. § 211(a), did not preclude judicial review of a claim that the VA's denial of certain benefits to recovering alcoholics violated § 504 of the Rehabilitation Act of 1973). A careful examination of the circumstances surrounding the adoption of FIRREA might indeed yield "'clear and convincing evidence,'" *Abbott Labs.* v. *Gardner,* 387 U.S. 136, 141 (1967) (internal citations omitted), sufficient to overcome "the strong presumption that Congress intends judicial review of administrative action," *Bowen* v. *Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986), but our hurried consideration of this stay motion precluded any such examination.

Despite the majority's reassurance that it is "deciding only the clear case before us," Maj. op. at 6, that cannot be so. The implications of its basic approach and its holding cannot be so

easily cabined. It has declined to inquire into any indicia of congressional intent that might limit the sweep of § 1821(j)'s broad prohibition, and it has declined to interpret the statute to make the FDIC's exercise of its functions generally subject to other federal laws. *See* Maj. op. at 6. How then can we read its "plain meaning" rationale other than to preclude virtually any other case "a legal mind could conjure"? Maj. op. at 7.[4] The majority cannot have it both ways. By this decision, the majority does effectively insulate the FDIC from judicial intervention even in the face of allegations of egregious violations of federal law threatening grave and irreparable harm. Suppose, for example, that the FDIC, acting in its receiver capacity, were operating a factory or even a hazardous waste facility in a manner that was causing serious health or environmental damage and that allegedly violated the Clean Water Act or the Occupational Safety and Health Act. The majority's approach would effectively hold the court powerless to take "any action . . . to restrain or affect" that operation, unless the FDIC "has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted powers or functions." Maj. op. at 5. This case, however, raises the question—again hardly a frivolous one—whether the freedom to wholly disregard the NHPA, a duly enacted law applicable to all other federal agencies, is indeed a statutorily granted receiver power, so that the FDIC may violate that law, without acting outside the scope of its powers.

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[4] Nor does the majority negate the broad implications of its ruling by its passing reference to *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). *Enochs* held that a taxpayer could seek to enjoin the collection of a tax only where the government had no chance, under any circumstances, of prevailing on its claim, such that its action would be an "exaction" in "the guise of a tax." *Id.* (internal citation omitted). So limited a remedy provides no relief in situations like this one, where two different district court judges have determined that the party seeking an injunction has made a strong showing on the merits. *National Trust for Historic Preservation* v. *FDIC*, No. 93-0904-HHG (D.D.C. May 7, 1993), slip op. at 7 (Trust had "established absolute irreparable harm" and had shown that it "m[ight] well prevail" on the merits); *id.* (D.D.C. May 14, 1993) (agreeing that the Trust had made a "strong showing on the merits").

I do not mean to suggest that appellants do not face significant hurdles in their argument for jurisdiction. In *Rosa,* for example, the Third Circuit held that the district court lacked jurisdiction over a request for an injunction prohibiting the RTC, in its role as conservator, from terminating a pension plan in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), or requiring it to make payments to the plan's trustees. Read broadly, *Rosa* could be taken to preclude jurisdiction over injunctions alleging violations of federal laws not directly related to the resolution of creditors' claims under FIREA. A tighter reading of *Rosa,* however, reveals certain distinctions. First, the *Rosa* court expressly reserved ruling on possible exceptions to § 1821(j), such as those based on the absence of an alternative remedy, *Rosa,* 938 F.2d at 400, an argument not put forward there but squarely presented here. Second, the *Rosa* court expressly concluded that the anti-injunction provision did not bar claims against the RTC in its corporate capacity. *Id.* at 393. Briefing and argument could shed light on the proper reading of *Rosa* and the right resolution of these questions.

This action was brought not by a disappointed claimant, but by, among others, the National Trust for Historic Preservation in the United States, the primary congressionally-authorized protector of the nation's significant historical properties. Before the preliminary injunction was denied in a conclusory one-paragraph order, a different district court had already concluded that the National Trust had "established absolute irreparable harm" and had shown that it "m[ight] well prevail" on the merits, and that a temporary restraint would not cause serious harm to the appellee and would be in the public interest. *National Trust for Historic Preservation* v. *FDIC,* No. 93-0904-HHG (D.D.C. May 7, 1993), slip op. at 7. Given the high stakes here, both in this and in future cases, I would, at a minimum, follow the lead of our sister circuits and allow this question to be decided in a more comprehensive, albeit expedited, fashion with regular briefing and argument, instead of making *binding* circuit precedent in barely over a week on an *unargued* stay motion.

## APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter of U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 25, 1994 Decided April 22, 1994

No. 93-5137

National Trust for Historic Preservation in the United States; Historic Preservation League, Inc., a Non-profit Corporation; Preservation Texas, Inc., a Non-profit Corporation,

*Appellants*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION; ANDREW C. HOVE, JR., in his official capacity as Acting Chairman, Federal Deposit Insurance Corporation,

*Appellees*

Appeal from the United States District Court for the District of Columbia (93cv00904)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Richard B. Nettler* argued the cause for appellants. With him on the briefs were *David A. Doheny, Elizabeth S. Merritt* and *Andrea C. Ferster.*

*Jerome A. Madden,* Counsel, Federal Deposit Insurance Corporation, argued the cause for appellees. With him on the brief were *Ann S. DuRoss,* Assistant General Counsel, and *Richard J. Osterman, Jr.,* Senior Counsel, Federal Deposit Insurance Corporation.

*Kirk Kelso Van Tine* and *P. Matthew Sutko* entered appearances for *amicus curiae* Resolution Trust Corporation.

*Stuart W. Bowen, Jr.* entered an appearance for *amicus curiae* Texas Historical Commission.

Before: WALD, SILBERMAN, and RANDOLPH, *Circuit Judges.*

Opinion PER CURIAM.

Concurring opinion filed by *Circuit Judge* WALD in which *Circuit Judge* SILBERMAN joins.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

PER CURIAM: Upon consideration of the briefs and oral argument on rehearing, the original panel opinion, reported as *National Trust for Historic Preservation* v. *FDIC,* 995 F.2d 238 (D.C. Cir. 1993), is ordered reinstated, except for the analysis of *South Carolina* v. *Regan,* 465 U.S. 367 (1984), contained in footnote one, which is now controlled by Judge Wald's concurrence.

The original panel held that 12 U.S.C. § 1821(j), which bars courts from restraining or affecting the FDIC in the exercise of its powers or functions as a conservator or receiver, applied in this case as a result of 12 U.S.C. § 1823(d)(3)(A). 995 F.2d at 240. Section 1823(d)(3)(A) provides: "With respect to any asset acquired or liability assumed pursuant to this section, the Corporation shall have all of the rights, powers, privileges, and authorities of the Corporation as receiver under sections 1821 and 1825(b) of this title." Shortly after our opinion issued, the Fifth Circuit, in a somewhat different factual setting, permitted an

injunction action against the FDIC to go forward. *Sierra Club, Lone Star Chapter* v. *FDIC,* 992 F.2d 545 (5th Cir. 1993). Nothing said in *Sierra Club* persuades us to alter the panel's original decision.

There is no question that the "rights, powers, privileges, and authorities" granted the FDIC under § 1821 devolve upon it when it acquires assets or assumes liabilities pursuant to § 1823. In *Sierra Club,* however, the Fifth Circuit expressed doubts about whether the FDIC had acted under § 1823, or under some other provision. 992 F.2d at 549-50. Whatever may have been the situation there, in this case there is no doubt that the FDIC acquired the Dr. Pepper Headquarters Building pursuant to § 1823, as our original opinion recognized. 995 F.2d at 240. Appellants do not contend otherwise.

The Fifth Circuit also believed that § 1823(d)(3)(A) did not "clearly and unambiguously" give "the FDIC the 'privilege' to be free of the court's equity jurisdiction." 992 F.2d at 550. The court offered no explanation for this conclusion and we do not agree with it. Our original opinion concluded that the FDIC's immunity from judicial restraint is among the "rights, powers, privileges, and authorities" (§ 1823(d)(3)(A)) contained in § 1821. 995 F.2d at 240. It is in that category for two reasons. First, it is set forth in a subsection of § 1821, that is, in § 1821(j). Second, the FDIC's immunity from judicial restraint, like the FDIC's exemption from state taxation and the immunity of its property from levy, attachment or garnishment, which § 1823(d)(3)(A) also bestows on the FDIC through its reference to § 1825(b), is among the FDIC's "rights, powers, privileges, and authorities" when it is acting as a receiver. It is no answer to say, as appellants do, that § 1821(j) merely "operates as a limitation on the rights of third parties to obtain injunctive or equitable relief against the FDIC." Brief for Appellants at 15. By so limiting the powers, rights and privileges of third parties, § 1821(j) increased the rights, privileges and powers of the FDIC. To take away one person's "right" to sue another is to give the other the "right" not to be sued. The court in *Sierra Club,* 992 F.2d at 550, thought

it significant that § 1823(d)(3)(A) "does not speak directly to the equitable jurisdiction of the federal courts." We attach no importance to this. The provision is specific enough—every § 1821 right, power, privilege or authority of the FDIC as receiver is included. Section 1823(d)(3)(A)'s reference to § 1821 necessarily encompasses § 1821(j). Inclusion by reference is a time-honored drafting technique, without which federal statutes would become even more unwieldy than they already are.[1]

It is worth adding that, even apart from statutory language, the line drawn in *Sierra Club* raises problems. The FDIC is authorized to operate in the capacity of a corporate insurer under § 1823, *see FDIC* v. *Nichols,* 885 F.2d 633, 636 (9th Cir. 1989), and in the capacity of a receiver for failed financial institutions under § 1821, *see* 12 U.S.C. § 1821(c)(2) & (3). The FDIC has discretion regarding whether it will wear one hat or the other, or both. To hold, as the Fifth Circuit did, that when the FDIC acts in its corporate capacity, § 1823(d)(3)(A) does not insulate it from judicial restraint pursuant to § 1821(j), is to create an incentive for the FDIC to act as receiver in order to avoid the consequences of litigation and delay. Such a system would make little sense. The FDIC's charge is to maximize the value of the failed institution's assets and it should be free to

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[1] *Abbott Bldg. Corp.* v. *United States,* 951 F.2d 191 (9th Cir. 1991), construed 12 U.S.C. § 1464(d)(6)(C) (1988), which protects the Federal Savings and Loan Insurance Corporation (FSLIC) against judicial restraint when it acts as a receiver, much in the same way and with the same language as § 1821(j) protects the FDIC. The FSLIC, acting as a receiver, purchased plaintiff's property with a credit bid at a foreclosure sale held under state law. Plaintiff, claiming that the sale was not conducted in accordance with state law, sued to set the sale aside. The court held that the suit did not seek to "restrain or affect" the FSLIC's powers as a receiver, but "simply leaves the determination of third party rights in the hands of others." 951 F.2d at 195. The court limited its holding to situations in which the FSLIC, acting as a receiver, had acquired property in an invalid foreclosure sale. *Id.* The court added that the statute would still immunize the FSLIC from claims that it had acted in an "improper manner." Given the limited scope of this holding, in a situation far removed from this case, we see no need to discuss whether we agree with it.

decide whether this is best accomplished if it acts as a receiver or in its corporate capacity or both.[2]

The judgment of the district court dismissing the suit for lack of jurisdiction is affirmed for the reasons stated in the original panel opinion and for the reasons stated above.

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[2] *California* v. *Grace Brethren Church,* 457 U.S. 393 (1982), forecloses appellants' argument that § 1821(j) does not bar its suit to the extent it is seeking a declaratory judgment rather than an injunction. There is, the Court ruled, so "little practical difference between injunctive and declaratory relief" that a statute barring injunctions will also have the effect of barring declaratory judgments. 457 U.S. at 408-09; *see also Sanchez-Espinoza* v. *Reagan,* 770 F.2d 202, 208 n.8 (D.C. Cir. 1985).

WALD, *Circuit Judge*, with whom SILBERMAN, *Circuit Judge*, joins, concurring: With the benefit of full briefing and argument, I now agree with the result and the basic reasoning of the reinstated panel opinion on the construction of 12 U.S.C. § 1821(j) and its application to the FDIC in its corporate capacity via 12 U.S.C. § 1823(d)(3)(A). That plenary treatment allows us to decide this important case of first impression in our circuit with the necessary confidence which I, for one, did not have months ago when forced to a decision "in barely over a week on an *unargued* stay motion." *National Trust for Historic Preservation in the United States* v. *FDIC*, 995 F.2d 238, 244 (D.C. Cir. 1993) (Wald, J., dissenting). I was concerned then—I believe justifiably—about "potentially immunizing an agency from court enforcement of the entire U.S. Code," a result which I thought warranted an in-depth review of the statute, its structure, purpose and history. It seemed counter-intuitive that the FDIC, acting in its receiver capacity, could "operat[e] a factory or even a hazardous waste facility in a manner that was causing serious health or environmental damage and that allegedly violated the Clean Water Act or the Occupational Safety and Health Act[, and] court[s would be] powerless to take 'any action . . . to restrain or affect' that operation, unless the FDIC 'has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted powers or functions.'" *Id.* at 244 (Wald, J., dissenting) (quoting panel majority, *id.* at 240). Indeed, even more horrendous hypotheticals could be constructed. Would the courts be powerless if the FDIC chose to sell crack cocaine in an effort to liquidate assets discovered in an unclaimed safety deposit box of a failed bank? It is of course by the use of such unlikely scenarios that judges test the integrity and inevitability of "plain meaning" interpretations.

While after further study and reflection I agree with the original panel majority that the language of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections in the United States Code), supports its construction, the result is sufficiently 'odd' so as to oblige us to "search

for other evidence of congressional intent to lend the term its proper scope." *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 454 (1989) (quoting *Green* v. *Bock Laundry Mach. Co.,* 490 U.S. 504, 509 (1989)). For example, in *South Carolina* v. *Regan,* 465 U.S. 367 (1984), the Supreme Court considered a similarly sweeping limitation on court action appearing in the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a): "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." In *Regan*, the Court turned to the Tax Anti-Injunction Act's legislative history, despite the fact that the Act's language "could scarcely be more explicit," *Bob Jones Univ.* v. *Simon,* 416 U.S. 725, 736 (1974). The legislative history discussed in *Regan* by no means abounded with detailed revelations of congressional intent, but the Court nonetheless concluded from it that the Act's "purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." 465 U.S. at 378 (footnote omitted). *See also id.* at 373-74, 377.

I don't agree with the suggestion by the original panel majority that the *Regan* Court's recourse to legislative history as a means of narrowing the scope of an otherwise improbably broad statute was confined to the "unique context" of tax collection or "Supreme Court doctrine that otherwise insulates the tax collector against suits that would deflect the collector's energies from the collection of taxes." *National Trust*, 995 F .2d at 239 n.1. To the contrary, the special governmental interest in insulating the tax collector from suits would argue *against* consulting legislative history to insure there was not a contrary interpretation that would reduce the tax collector's protection from court action in apparent contradiction to the statute's plain meaning. Nonetheless, my own research—and counsels'—has uncovered no evidence in this case that § 1821(j) was passed in the "context of a statutory scheme that provided an alternative remedy,"

*Regan*, 465 U.S. at 373, for any and all misfeasance by the liquidating agency, or otherwise bars only actions brought by parties who have access to an alternative remedy against the agency.

Therefore, I am compelled to conclude that § 1821(j) does indeed bar courts from "restrain[ing] or affect[ing] the exercise of powers or functions of the [FDIC] as a conservator or a receiver," 12 U.S.C. § 1821(j), unless it "has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions," *National Trust,* 995 F.2d at 240. Congress undoubtedly did not contemplate anything like the parade of possible violations of existing laws—civil and criminal—that creative judges can conjure up, but given the breadth of the statutory language, untempered by any persuasive legislative history pointing in a different direction, the statute would appear to bar a court from acting in virtually all circumstances. I am somewhat assuaged by the fact, described at oral argument and in the briefs, that a private person genuinely aggrieved by such unlawful FDIC action could generally bring a suit for damages, or seek administrative redress through the § 1821(d) monetary claims procedure which ultimately includes judicial review. *See Rosa* v. *Resolution Trust Corp.,* 938 F.2d 383, 399-400 (3d Cir.), *cert. denied,* 112 S. Ct. 582 (1991) ("the effect of [§ 1821(j)] in this case is solely to prevent a particular remedy . . . [and] does not deprive plaintiffs, if wronged, of any other remedy that would not 'restrain or affect' the exercise of the receiver's or conservator's powers or functions"). And, of course, we do not decide today what might happen if the denial of an injunction in any particular situation itself violated constitutional due process. *Cf. Regan,* 465 U.S. at 375; *id.* at 393-94 (O'Connor, J., concurring in judgment).

Thus, it would seem that the instant situation in which the FDIC is alleged to have violated sections 106 and 110(a) of the National Historic Preservation Act, 16 U.S.C. §§ 470f, 470h-2(a), is the exception rather than the rule. Without jurisdiction, we cannot express any opinion on whether the FDIC is statutorily compelled to consult with the Advisory Council before selling for

demolition structures like the Dr. Pepper building which is "considered one of the finest examples of Art Moderne architecture in Texas." *National Trust*, 995 F.2d at 241 (Wald, J., dissenting). *See California* v. *Grace Brethren Church,* 457 U.S. 393, 408-11 (1982) (holding declaratory judgment generally barred whenever injunction is prohibited). Congress, of course, can change this state of affairs should it so choose.

RANDOLPH, *Circuit Judge*, concurring: I continue to believe footnote one of the original panel opinion, 995 F.2d at 239 n.1, properly describes and distinguishes *South Carolina v. Regan*, 465 U.S. 367 (1984).

APPENDIX C

**No. 93-5137** FILED OCT 21, 1993

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1993

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NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES; HISTORIC PRESERVATION LEAGUE, INC., A NON-PROFIT CORPORATION; PRESERVATION TEXAS, A NON-PROFIT CORPORATION,

*Appellants*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION; ANDREW C. HOVE, JR., in his official capacity as Acting Chairman, Federal Deposit Insurance Corp.,

**BEFORE:** Wald, Silberman,* and Randolph,** Circuit Judges

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ORDER

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Upon consideration of appellants' petition for rehearing, it is

**ORDERED** that the petition for rehearing be granted. The Clerk is directed to calendar this case for oral argument and establish a briefing schedule. It is

**FURTHER ORDERED,** on the court's own motion, that the court's judgment and opinion filed May 28, 1993, be vacated.

*Per Curiam*

**FOR THE COURT:**
Ron Garvin, Clerk

By: _____
Deputy Clerk

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* Judge Silberman was selected to replace Justice Ruth B. Ginsburg as a member of the panel.

** Judge Randolph would deny the petition for rehearing.

## APPENDIX D

IN THE

# United States District Court

FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES *et al.*, *Plaintiffs,* v. FEDERAL DEPOSIT INSURANCE CORP., *et al.*, *Defendants.* | Civil Action No.93-0904 (HHG) |

## ORDER

Plaintiffs, the National Trust for Historic Preservation, the Historic Preservation League, Inc., and the Historic Preservation League of Dallas, seek a preliminary injunction preventing the FDIC from completing the sale and demolition of the Dr. Pepper Headquarters in Dallas, Texas. While the Court agrees that the Plaintiffs have made a strong showing on the merits of the case, it finds that the anti-injunction provision in 12 U.S.C. § 1821(j) prevents it from enjoining the sale at issue here. Accordingly, Plaintiffs' motion for a preliminary injunction is denied. Moreover, because the Court does not have jurisdiction, the case is hereby dismissed.

So ordered this 14th day of May, 1993.

HAROLD H. GREENE
*United States District Judge*

## APPENDIX E

IN THE

# United States District Court

FOR THE DISTRICT OF COLUMBIA

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES *et al.*,

*Plaintiffs,*

v.

FEDERAL DEPOSIT INSURANCE CORP., *et al.*,

*Defendants.*

Civil Action No.93-0904 (HHG)

MEMORANDUM AND ORDER

Plaintiffs, the National Trust for Historic Preservation in the United States, the Historic Preservation League, Inc., and the Historic Preservation League of Dallas, seek a temporary restraining order preventing defendants the Federal Deposit Insurance Corporation (FDIC), *et al.*, from completing the sale and demolition of the Dr. Pepper Headquarters in Dallas, Texas. Because plaintiffs have met their burden for temporary injunctive relief, their application for a temporary restraining order is granted and a date set for a preliminary injunction hearing.

## I.

According to plaintiffs, the Dr. Pepper building at issue, which was constructed in 1948, is one of the finest examples of Art Moderne in Texas. On March 15, 1993, the building was found eligible for listing on the National Register of Historic Places.

In November 1991, the FDIC obtained title to the Dr. Pepper Headquarters building in the process of liquidating certain assets of the failed First Republic Bank of Dallas. On March 11, 1993, the FDIC entered a contract to sell the building to DalMac Investment Corporation ("DalMac"). The sale to DalMac is to be closed May 10, 1993. DalMac intends to demolish the building and previously obtained a demolition permit. DalMac withdrew its demolition permit on April 30, 1993, however, as part of its efforts to resolve the historic preservation issues with the local community.

Plaintiffs contend that the FDIC's action violates the National Historic Preservation Act, 16 U.S.C. § 470 *et seq* (NHPA). The NHPA is dedicated to preserving the nation's historic properties to ensure that its "legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained...for future generations." 16 U.S.C. § 470(b). The Act protects listed historic properties by, among other things, requiring all federal agencies to factor into their decision-making any adverse effect their "undertakings" would have on such property. Section 106 of the NHPA provides in part as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally-assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C. § 470f.

As an additional safeguard, federal agencies must give the Advisory Council on Historic Preservation an opportunity to

comment on any proposed "undertaking" and to suggest measures to mitigate any adverse effects caused by the project. *Id.* "Undertaking" is broadly defined as: a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including

(A) those carried out by or on behalf of the agency;

(B) those carried out with Federal financial assistance;

(C) those requiring a Federal permit, license or approval; and

(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

NHPA Amendments of 1992, Pub. L. No. 102-575, § 4019(a)(5) (to be codified at 16 U.S.C. § 470w(7)).

The Advisory Council's regulations indicate that a sale or transfer of a building by an agency triggers NHPA's consultation requirements. 36 C.F.R. § 800.9(b)(5).

Plaintiffs argue that the FDIC is acting as a federal agency, that the Dr. Pepper building sale is an undertaking within the meaning of the Act, and that the FDIC has failed to give the Advisory Council an opportunity to comment on the effects of the proposed sale and demolition, as required by the Act. 16 U.S.C. § § 470f and 470h-2(a). Plaintiffs previously have communicated to the FDIC their belief that the sale cannot proceed without compliance with the Act.

The FDIC does not deny that it has not complied with the Act's requirements. Although conceding that the building was transferred to the FDIC "in its corporate (liquidation) capacity," Def. Mem. at 4, defendants argue that the FDIC is not a federal agency when acting as a liquidator, and therefore is not obligated to consult with the Advisory Council on Historic Preservation.

Defendants point to 12 U.S.C § 1821(j), in support of this proposition. That provision states that, except as provided in that section, "no court may take any action...to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." They also argue that under 12 U.S.C. § 1821(d), "no court shall have jurisdiction over...any claim relating to any act or omission" of the FDIC in its capacity as a receiver. 12 U.S.C. § 1821(d)(13)(D)(ii).

Plaintiffs counter that § 110 of the NHPA applies the NHPA to any federal agency with "jurisdiction or control" over a historic property. 16 U.S.C. § 470f. Plaintiffs state that the FDIC clearly is a federal agency when it is acting in its corporate capacity. *See, e.g., Commerce Federal Savings Bank* v. *FDIC*, 872 F.2d 1240, 1248 (6th Cir. 1989); *Rauscher Pierce Refsnes, Inc.* v. *FDIC*, 789 F.2d 313, 314 (5th Cir. 1986). Plaintiffs contend that here the FDIC is acting purely in its corporate capacity, that the FDIC is a federal agency when acting in this capacity, *see Commerce Fed. Sav. Bank* v. *FDIC*, 872 F.2d 1240, 1248 (6th Cir. 1989), and that 1821(j)[1] accordingly does not apply. Plaintiffs contend that the limitations on federal jurisdiction in § 1821(d) only apply to claims for monetary damages, not suits for injunctive relief. *See Rosa* v. *Resolution Trust Corporation*, 938 F.2d 383, 394-95 (3d Cir. 1991). Plaintiffs point out that the FDIC also has other attributes of a federal agency. *See Mendrala* v. *Crown Mortgage Co.*, 955 F.2d 1132, 1138 (7th Cir. 1992).

## II.

In deciding whether to grant a temporary restraining order, the Court weighs whether plaintiff has demonstrated the following four factors: (a) a substantial likelihood of success on the merits; (b) irreparable injury absent injunctive relief; (c) absence

---

[1] Even if defendants are acting in their capacity as a receiver, however, plaintiffs state § 1821(j) still would not bar jurisdiction, since anti-injunction provisions do not apply where no alternative to judicial review is available. *South Carolina* v. *Regan*, 465 U.S. 367 (1984).

of substantial harm to other parties if the injunction is granted; and (d) benefit to the public interest. *See, e.g., Sea Containers; Ltd.* v. *Stena AB*, 890 F. 2d 1205, 1208 (D.C. Cir, 1989). This Circuit has adopted a relative balancing test for granting temporary injunctive relief. Thus,

> [A] movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*.

*Coumo* v. *United States Nuclear Regulatory Com.*, 772 F. 2d 972, 974 (D.C. Cir. 1985). *See also Woerner* v. *United States Small Business Admin.*, 739 F. Supp. 641, 650 (D.D.C. 1990).

Where a strong showing is made of irreparable harm, therefore, a plaintiff need only demonstrate a likelihood of success on the merits or serious questions going to the merits, in order to prevail in its application for temporary injunctive relief.

In the present case, plaintiffs have met their burden for each of the four prongs of this test. Plaintiffs have established absolute irreparable harm. No remedy at law is available to compensate plaintiffs if the sale proceeds. Although DalMac has offered to delay demolishing the building for six months, the sale of the building to a private agency would remove it from the jurisdictional scope of the NHPA. *See Gettysburg Battlefield Preservation Ass'n.* v. *Gettysburg College*, 779 F. Supp. 1571, 1576-1577, 1580-1581 (M.D. Pa. 1992).[2]

Having made a strong showing of irreparable harm, plaintiffs need only raise serious questions going to the merits. Plaintiffs readily meet this burden, and may well prevail, after full briefing and argument of the issues, on the question of whether

---

[2] Defendants attempt to argue that, while injunctive relief is precluded by the statute, plaintiffs may seek a declaratory judgement or judicial review of the merits. This argument is disingenuous, however, since all parties agree the NHPA will not apply to the building once it is transferred to private ownership.

the FDIC is acting in its corporate capacity as a federal agency, and therefore is required to comply with § 106 of the NHPA. In any event, plaintiffs have demonstrated a sufficient likelihood of success on the merits to be entitled to temporary injunctive relief.

With respect to the harm to defendant, defendant argues if the sale is temporarily restrained pending resolution of the merits, "the entire process by which the FDIC resolves a filed financial institutions would be imperiled." Def. Mem. at 19. This argument is untenable. The only identifiable harm to defendants resulting from a temporary restraining order would be a brief delay in the sale of the property. In contrast, if no restraining order is issued, the building will be sold and plaintiffs' claim will be moot.

The public interest also clearly favors granting the relief plaintiffs seek, for it is a longstanding public policy of this nation to "preserve for public use historical sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. § 461. It is in the public's interest to ensure that historic properties in the FDIC's possession are protected to the degree provided by federal law.

Accordingly, it is this 7th day of May, 1993, hereby

ORDERED: that, pending a decision on plaintiffs' application for a preliminary injunction, defendants should be, and are hereby, restrained and enjoined from selling, demolishing or otherwise disposing of the Dr. Pepper headquarters building without complying with the NHPA; and it is further

ORDERED: that plaintiffs may file a memorandum in support of their motion for a preliminary injunction, if any, on or before May 11, 1993; and it is further

ORDERED: that defendants may file a response, if any, on or before May 13, 1993; and it is further

ORDERED: that plaintiffs may file a reply, if any, on or before May 14, 1993; and it is further

ORDERED: that the parties shall attend a hearing on the motion for a preliminary injunction before Judge Harold Greene on May 14, 1993, at 9:45 a.m. in Courtroom 1.

_____

*United States District Judge*



## APPENDIX F

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

**The Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA") provides:**

**12 U.S.C. § 1821(j):**

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

**12 U.S.C. § 1821(d)(13)(D):**

Except as otherwise provided in this subsection, no court shall have jurisdiction over—

> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

**12 U.S.C. § 1823(d)(3)(A):**

With respect to any asset acquired or liability assumed pursuant to this section, the Corporation shall have all of the rights, powers, privileges and authorities of the Corporation as receiver under section 1821 and 1825(b) of this title.

**Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f, provides that:**

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to approval of the expenditure of any Federal funds

on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion on the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking.

**Section 110(a) of the NHPA, 16 U.S.C. § 470h-2(a), provides that:**

(1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. * * *

(2) Each Federal agency shall establish * * * a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and preservation of historic properties. Such program shall ensure—

> (A) that historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register;
>
> (B) that such properties * * * as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 106 * * * * ;
>
> (C) that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning;

**Section 301w(7) of the NHPA, 16 U.S.C. § 470w(7), provides that:**

"Undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

(A) those carried out by or on behalf of the agency;

(B) those carried out with Federal financial assistance;

(C) those requiring a Federal permit[,] license, or approval; and

(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

**Section 800.2(o) of the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. § 800.2(o), states:**

"Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106.

Supreme Court, U.S.
FILED
NOV 21 1994
OFFICE OF THE CLERK

No. 94-317

# In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, ET AL., PETITIONERS

*v.*

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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*Counsel*
*Federal Deposit Insurance Corporation*
*Washington, D.C. 20429*

## QUESTION PRESENTED

Whether the anti-injunction provisions of 12 U.S.C. 1821(j) (Supp. V 1993), as applied by 12 U.S.C. 1823(d)(3)(A) to certain actions of the Federal Deposit Insurance Corporation in acquiring and disposing of the assets of a failed depository institution, deprive the courts of jurisdiction to provide injunctive or declaratory relief to a plaintiff that alleges a violation of the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, but that asserts no monetary claim that could be resolved through available alternative administrative or judicial proceedings.

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-317

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, ET AL., PETITIONERS

*v.*

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The final opinion of the court of appeals (Pet. App. B1-B10) is reported at 21 F.3d 469. The initial (and reinstated) opinion of the court of appeals (Pet. App. A1-A14) is reported at 995 F.2d 238. The order of the court of appeals vacating the initial opinion and granting rehearing (Pet. App. C1) is reported at 5 F.3d 567. The order of the court of appeals discharging its prior order to show cause on the issue of mootness and denying petitioner's suggestion of rehearing en banc (App., *infra*, 1a-2a) is unreported, as is that court's order entering an administrative stay pending resolution of petitioners' motion for a stay pending appeal (App., *infra*, 3a-4a). The

opinion and order of the district court granting a temporary restraining order (Pet. App. E1-E7) and its later order dismissing the case for lack of jurisdiction (Pet. App. D1) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on April 22, 1994. On June 17, 1994, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 20, 1994. The petition was filed on August 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Federal Deposit Insurance Corporation (FDIC) plays an important role in safeguarding the soundness and stability of the nation's banking system. In discharging its responsibilities, the FDIC operates in at least two distinct capacities. First, in its "corporate" capacity the FDIC insures deposits, monitors the safety and soundness of insured banks and savings associations, and exercises certain other regulatory authority. See, *e.g.*, 12 U.S.C. 1811, 1814-1821(a), 1828 (1988 & Supp. V 1993); see generally *FDIC* v. *Bank of Boulder*, 911 F.2d 1466, 1469-1471 (10th Cir. 1990), cert. denied, 499 U.S. 904 (1991); *FDIC* v. *Nichols*, 885 F.2d 633, 636 (9th Cir. 1989). Second, under certain circumstances the FDIC is authorized to act in the capacity of conservator or receiver for a failed or failing depository institution. See 12 U.S.C. 1821(c) (1988 & Supp. V 1993).

The statute also provides that where an insured institution has failed or is threatened with failure, the FDIC may support the institution, or facilitate its reorganization or sale as a going concern, by providing various forms of direct financial assistance. 12 U.S.C.

1823 (1988 & Supp. V 1993). That assistance may take the form of a purchase of assets by the FDIC from the institution or from its conservator, liquidator or receiver—including from the FDIC itself in its capacity as conservator or receiver. See 12 U.S.C. 1823(c) and (d) (1988 & Supp. V 1993). Such purchases are made by the FDIC in its own, "corporate" capacity. With respect to assets so acquired, however, 12 U.S.C. 1823(d)(3)(A) provides that the FDIC "shall have all of the rights, powers, privileges, and authorities of the [FDIC] as receiver under sections 1821 and 1825(b) of [Title 12]."

2. In 1985, RepublicBank Dallas, N.A., made a loan secured in part by a deed of trust covering certain property in Dallas, Texas, including the headquarters of the Dr. Pepper Company. C.A. App. 43; Pet. C.A. Br. 5. The bank's corporate successor later became insolvent, and in 1988 the Comptroller of the Currency appointed the FDIC to act as its receiver. C.A. App. 43. The FDIC, as receiver, transferred various assets of the failed bank, including the deed of trust, to a newly created "bridge bank" (see 12 U.S.C. 1821(n)(1)(A) (Supp. V 1993)) that eventually became NCNB Texas National Bank (NCNB Texas). In its continuing effort to mitigate losses to the federal insurance system, the FDIC also provided financial assistance to NCNB Texas, in accordance with 12 U.S.C. 1823(c). Under the assistance agreement, NCNB Texas had a contractual right to require that the FDIC repurchase certain of the transferred assets at a later date. See C.A. App. 43-44.

In 1991, NCNB Texas exercised its option and the FDIC accordingly repurchased a variety of the transferred assets for approximately $2.5 billion. In the interim, NCNB Texas had foreclosed on the loan secured by the 1985 deed of trust, and the assets reacquired by the FDIC included title to the Dallas property and the

Dr. Pepper building. See C.A. App. 44. In 1992, the Dallas Area Rapid Transit Authority completed condemnation proceedings on part of the Dr. Pepper parcel, resulting in impeded access to the building and other changes potentially affecting the building's value. *Id.* at 39. In early 1993, as part of its liquidation of the assets repurchased from NCNB Texas, the FDIC agreed to sell the remainder of the Dr. Pepper property to Dal-Mac Investment Corporation, the high bidder in a public sealed-bid auction. Pet. App. E2; C.A. App. 39-40. Closing of the sale was scheduled for May 10. In March, 1993, Dal-Mac applied for a permit to demolish the Dr. Pepper building. That application was later withdrawn. Pet. App. E2.

3. Petitioners brought this action seeking injunctive and declaratory relief to prohibit the FDIC from selling the Dr. Pepper building without first complying with the requirements of Section 106 of the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470f. That Section requires that any "Federal agency" with jurisdiction over a proposed "Federal or federally assisted undertaking" consider the effect of that undertaking on any property eligible for listing on the National Register of Historic Places. As part of its consider-ation, the agency "shall afford the Advisory Council on Historic Preservation established under [the NHPA] a reasonable opportunity to comment with regard to such undertaking." *Ibid.*

The district court granted a temporary restraining order prohibiting consummation of the sale on May 10, and set a hearing on May 14, 1993. Following that hearing, however, the court held (Pet. App. D1) that it was precluded from granting injunctive relief in this case by the terms of 12 U.S.C. 1821(j) (Supp. V 1993), which provides that except as otherwise specified

elsewhere in Section 1821, "no court may take any action * * * to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." The court therefore denied petitioners' motion for a preliminary injunction and dismissed the action for lack of jurisdiction. Pet. App. D1.

After expedited briefing (during which the court entered an interim order (App., *infra*, 3a-4a) prohibiting the sale), the court of appeals initially denied petitioners' motion for a stay pending appeal and affirmed the dismissal of petitioners' action. Pet. App. A1-A7. The court held that in acquiring and then selling the Dr. Pepper Building, which came into its hands only because it was pledged as collateral on a defaulted loan made by a failed, federally insured financial institution, the FDIC was acting "as a liquidator with the powers of a receiver" under the provisions of 12 U.S.C. 1823(c) (1988 & Supp. V 1993) and (d)(3)(A) (Supp. V 1993). Pet. App. A2, A6. The court concluded (*id.* at A5-A6) that, under the circumstances of this case, Section 1823(d)(3)(A) extended the anti-injunction provisions of Section 1821(j) to the FDIC's actions in that capacity. See pages 2-3, *supra*. The court rejected (Pet. App. A3-A5 & n.1) petitioners' argument that Section 1821(j) applies only where the underlying claim is subject to the administrative claims procedures set out in 12 U.S.C. 1821(d), as well as their argument that Section 1821(j) cannot be applied unless Congress has provided parties like petitioners with some adequate alternative remedy. Judge Wald dissented on the ground that the court should not have rendered a decision without the benefit of more thorough consideration. Pet. App. A8-A14.

The court of appeals' decision was issued on May 28, 1993. Later the same day, the FDIC completed the sale of the Dr. Pepper building to Dal-Mac.

4. On June 1, 1993, petitioners filed a motion for rehearing and suggestion of rehearing en banc, and the FDIC filed a notice informing the court of the sale of the building. On July 20, the court entered an order to show cause why the case should not be dismissed as moot. Both parties filed responses to the order arguing that the case was not moot. On October 21, 1993, the court discharged the order to show cause, denied the suggestion for rehearing en banc, granted the petition for panel rehearing, vacated the court's prior opinion, and set the case for full briefing and argument. Pet. App. C1; App., *infra*, 1a. Judge Silberman was selected to replace Judge Ruth Bader Ginsburg as a member of the panel. Pet. App. C1 n.*.

In April, 1994, the court reinstated its prior opinion, except for the analysis of this Court's decision in *South Carolina* v. *Regan*, 465 U.S. 367 (1984). See Pet. App. B2. The per curiam lead opinion noted (*id.* at B2-B4) that shortly after the issuance of the original opinion below, the United States Court of Appeals for the Fifth Circuit permitted an injunction action against the FDIC to go forward "in a somewhat different factual setting." Pet. App. B2, citing *Sierra Club, Lone Star Chapter* v. *FDIC*, 992 F.2d 545 (1993). The court pointed out (Pet. App. B3) that the *Sierra Club* opinion questioned whether the FDIC had acted in that case under 12 U.S.C. 1823 or under some other authority, whereas "in this case there is no doubt that the FDIC acquired the Dr. Pepper Headquarters Building pursuant to § 1823," and therefore "no question" that Section 1821 applies. The court also reaffirmed its original conclusion that Section 1821(j)'s immunity from judicial restraint is one of the "rights, powers, privileges, and authorities" incorporated from Section 1821 by Section 1823(d)(3)(A), and rejected any contrary conclusion in *Sierra Club*. Pet.

App. B3-B4. Finally, the court rejected (*id.* at B5 n.2) petitioners' argument that Section 1821(j) did not bar their suit to the extent that it sought declaratory rather than injunctive relief.

In a separate opinion by Judge Wald, the court also revisited its previous rejection of petitioners' argument that Section 1821(j) should not be applied in this case because the elimination of injunctive relief would leave petitioners without an adequate judicial remedy for an alleged violation of federal law. Pet. App. B6-B9; see *id.* at B2. The court found that the exceptionally broad facial sweep of Section 1821(j) justified a resort to other evidence in order to determine the scope that Congress had actually intended for that provision. The court's inquiry disclosed "no evidence" that Congress intended to limit application of Section 1821(j) to cases in which the parties were accorded alternative means to pursue their grievances against the FDIC. Pet. App. B7-B8. The court therefore concluded that Section 1821(j) should be enforced in accordance with its terms. Pet. App. B8. Judge Randolph concurred in that holding for the reasons stated in the court's original opinion. *Id.* at B10; see *id.* at A3 n.1.

## ARGUMENT

1. As explained in the Statement (page 5, *supra*), the FDIC has sold the building at issue in this case, and it is therefore no longer in a position to comply with any prior consideration and consultation requirements that the NHPA might impose with respect to that sale. Nonetheless, we agree with the court of appeals' apparent conclusion (App., *infra*, 2a) that the case is not moot.[1]

[1] Petitioners argued below that sale of the property did not moot the case, both because the district court would have jurisdiction to void the sale if petitioners prevailed on the merits,

Petitioner the National Trust for Historic Preservation in the United States alleges that it is a nationwide institutional litigant with an asserted interest in seeking enforcement of the NHPA's requirements with respect to historic properties throughout the country.[2] Compl. 3-4; see generally 16 U.S.C. 468; cf. 16 U.S.C. 470, 470-1. If this case were dismissed as moot, the FDIC expects that the same issues would arise again in connection with its efforts to liquidate assets of other troubled depository institutions, and that the National Trust would seek to litigate them. Because of the relatively short time required to arrange for the sale of any given property, it is also reasonable to expect that such a sale would be completed before any judicial challenge could run its course.

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and because the issue was one capable of repetition but likely to evade review. Appellants' Pet. for Rehearing & Emer. Mot. for Stay Pending Appeal 12-14; Appellants' Memo. Showing Cause Why Case Is Not Moot 4, 9 n.4. The FDIC agreed on the latter ground. FDIC Memo. in Response to Court's Order Regarding Mootness 5-9.

[2] Petitioners' complaint alleges injury and standing on behalf of the National Trust not only on behalf of its members, Compl. 4 (¶ 7), but also "in its organizational capacity." *Id.* at 4 (¶ 6). Whether the Trust's alleged organizational injury would be sufficient by itself to support standing is open to serious question. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2137-2140 (1992); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Because this case was dismissed on the pleadings, however, the Court may presume, for purposes of acting on the petition, that the complaint's allegations "embrace those specific facts that are necessary to support the claim." *Defenders of Wildlife*, 112 S. Ct. at 2137 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

That result could be forestalled by temporary judicial restraint of the sale, as occurred for a time in this case. For that reason it is doubtful whether the issues involved can be said to "evade review" in the same sense as in controversies involving actions or conditions that by their nature cannot be postponed by an injunction or stay restraining one of the parties. See, *e.g.*, *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498 (1911) (administrative orders of limited facial duration); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-547 (1976) (gag order related to criminal trial); *Sosna* v. *Iowa*, 419 U.S. 393, 398-402 (1975) (one-year residency requirement); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (pregnancy); see also 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.8 & n.12 (1984 & Supp. 1994). The parties in this case are institutions engaged in ongoing courses of conduct, however, and they expect that the legal issues involved will continue to arise in situations with only immaterial factual variations. Under those circumstances, we think that the controversy between them can be considered to be sufficiently concrete and immediate to support the exercise of jurisdiction under Article III, and a declaration of their respective rights under 28 U.S.C. 2201. Cf. *Burlington N.R.R.* v. *Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (legislative action specific to particular controversy did not moot recurrent dispute between railroads and union).

2. Petitioners contend (Pet. 10, 15-17) that the decision below conflicts with that of the Fifth Circuit in *Sierra Club, Lone Star Chapter* v. *FDIC*, 992 F.2d 545 (1993). In *Sierra Club*, the FDIC had succeeded to the responsibilities of the former Federal Savings and Loan Insurance Corporation (FSLIC) under an agreement providing that the FSLIC would indemnify the successor

to a failed thrift against capital losses arising from the sale of certain assets, so long as the FSLIC had approved the terms of the sale. *Id.* at 547-548 & n.2. The successor located a purchaser for certain property, and the FDIC approved its sale. The Sierra Club then sought an injunction to require the FDIC to withdraw the approval until the FDIC had evaluated the environmental impact of the sale in accordance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 992 F.2d at 548. The FDIC invoked Section 1821(j) as a bar against the suit. The Fifth Circuit concluded, however, that Section 1821(j) applied by its terms only when the FDIC is "acting as a conservator or receiver," and that neither 12 U.S.C. 1821a(a)(4) (Supp. V 1993) nor 12 U.S.C. 1823(d)(3)(A) "clearly and unambiguously" applied the limits of Section 1821(j) to the factual situation before it. 992 F.2d at 548-549.

The decisions in this case and in *Sierra Club* reflect different approaches to analyzing the availability of injunctive and declaratory relief against the FDIC. As the court of appeals recognized (Pet. App. B3), however, the *Sierra Club* court expressed doubt about whether the factual situation before it implicated Section 1823(d)(3)(A) at all, rather than Section 1821a(a) (4), the analogous but differently worded provision applicable to cases in which the FDIC has succeeded to the functions of the FSLIC. See 992 F.2d at 549-550. In this case, there is no question that the property involved was acquired by the FDIC "pursuant to" Section 1823; and Section 1823(d)(3)(A), unlike Section 1821a(a)(4), refers specifically to the FDIC's "rights, powers, privileges, and authorities * * * as receiver under sectio[n] 1821." Moreover, *Sierra Club* involved the FDIC's decision to consent to the sale of an asset held by a private party. This case, by contrast, involves the actual sale of an

asset held by the FDIC itself. Because Section 1823(d)(3)(A) by its terms refers only to powers of the FDIC "[w]ith respect to any asset acquired or liability assumed" by the FDIC under Section 1823, in a future case the Fifth Circuit might find that difference significant.

The possibility that the Fifth Circuit would agree with the decision below in a case presenting the same facts is underscored by that court's opinion in *Ward* v. *RTC*, 996 F.2d 99 (1993), decided after *Sierra Club*, which twice cited with apparent approval the court of appeals' first opinion in this case. *Id.* at 102 n.8, 104 ("Like the FDIC in *National Trust for Historic Preservation*, the RTC here exercised the powers and functions of a receiver."). Whatever inconsistency exists between the decisions in this case and in *Sierra Club* thus appears to exist also in decisions within the Fifth Circuit itself. It should be resolved by that court in the first instance. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).[3]

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[3] The only other appellate decisions construing the meaning of Section 1823(d)(3)(A) are consistent with the decision in this case. See *GWN Petroleum Corp.* v. *Ok-Tex Oil & Gas, Inc.*, 998 F.2d 853 (10th Cir. 1993) (Section 1823(d)(3)(A) extends to the FDIC in its corporate capacity the bar against non-consensual garnishment proceedings pursuant to Section 1825(b)(2)); *FDIC* v. *American Casualty Co.*, 998 F.2d 404, 409 n.4 (7th Cir. 1993) ("Under 12 U.S.C. § 1823(d)(3)(A), the FDIC in its corporate capacity receives all the rights it possesses in its capacity as receiver when, as occurred here, FDIC-corporate purchases assets from FDIC-receiver."). Those decisions are also consistent with others confirming the broad reach of Section 1821(j) in cases where the FDIC (or the Resolution Trust Corporation) acts purely as a receiver or conservator. See, *e.g.*, *Telematics Int'l, Inc.* v. *NEMLC Leasing Corp.*, 967 F.2d 703 (1st Cir. 1992); *Volges* v. *RTC*, 32 F.3d 50 (2d Cir. 1994) (citing the decisions below in this case); *Gross* v. *Bell Savings Bank*, 974 F.2d 403, 406 (3d Cir. 1992);

3. Petitioners also argue (Pet. 13-17) that the judgment below conflicts with this Court's decision in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), because it would "[l]eav[e] aggrieved parties with no remedy whatsoever" for alleged violations of the NHPA. Pet. 13. In *Regan*, the Court undertook a lengthy review of the history and purposes of the Anti-Injunction Act, 26 U.S.C. 7421(a), which prohibits suits "for the purpose of restraining the assessment or collection of any tax." Based on that review, the Court concluded that Congress did not intend the Act to apply to actions brought by parties for whom Congress had not provided an alternative remedy, such as a refund suit. 465 U.S. at 373-381.

The original panel majority in this case largely confined *Regan* to its own specific statutory context. See Pet. App. A3 n.1. Even under the more expansive reading adopted by the final decision below, however, *Regan* stands at most for the proposition that a court is entitled to look beyond the plain language of a broad anti-injunction statute and to consider whether extrinsic evidence of legislative intent supports a narrowing judicial construction. In this case the court undertook such an inquiry, with the benefit of full briefing and argument, but "uncovered no evidence * * * that § 1821(j) was passed in the 'context of a statutory scheme that provided an alternative remedy,' *Regan*, 465 U.S. at 373, for any and all misfeasance by the liquidating agency, or otherwise bars only actions brought by

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*In re Landmark Land Co.*, 973 F.2d 283 (4th Cir. 1992); *United Liberty Life Ins. Co.* v. *Ryan*, 985 F.2d 1320 (6th Cir. 1993).

parties who have access to an alternative remedy against the agency." Pet. App. B7-B8.[4]

As the court of appeals pointed out in this case (Pet. App. B8), under the statutory scheme applicable to the FDIC, any "private person genuinely aggrieved by * * * unlawful FDIC action could generally bring a suit for damages, or seek administrative redress through the § 1821(d) monetary claims procedure which ultimately includes judicial review." Petitioners lack recourse to administrative and judicial review only because they are attempting to vindicate, not their own financial or property interests, but an asserted responsibility of one federal governmental instrumentality (the FDIC) to consult with another (the Advisory Council on Historic Preservation, see page 4, *supra*) before taking certain actions. Those circumstances reveal a potential clash of federal governmental interests—in protecting the orderly and efficient management of the deposit insurance system, on the one hand, and in insuring proper consideration of the value of historic properties, on the other. Given the clear and imperative language of Sections 1821(j) and 1823(d)(3)(A), however, any further accommodation of those interests must be accomplished

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[4] The history of the FDIC's anti-injunction provisions indicates congressional concern that the FDIC have the ability to carry out its functions without judicial interference, but otherwise provides little guidance beyond that contained in the language of the statute itself. It does not, in any event, indicate a focus on the availability of alternative remedies. See, *e.g.*, S. Rep. No. 1482, 89th Cong., 2d Sess. 14 (1966) (relating to former 12 U.S.C. 1464(d)(6)(C) (1988) (repealed)); H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 334 (1989).

through means other than litigation seeking injunctive relief.[5]

5. Finally, petitioners also contend (Pet. 11) that the decision below conflicts with the decision in *Rosa* v. *RTC*, 938 F.2d 383 (3d Cir.), cert. denied, 112 S. Ct. 582 (1991), on the question whether Section 1821(j) applies in the absence of an alternative remedy. But with respect to Section 1821(j), the plaintiffs in *Rosa* evidently argued only that the actions they asked the court to enjoin violated federal law, and for that reason were not "powers or functions" of the RTC within the meaning of that Section. See 938 F.2d at 397. The court rejected that argument (*id.* at 397-398), and struck down the injunctions in question on the ground that they did indeed interfere with the RTC's discharge of its responsibilities. *Id.* at 398-399. The court did observe, at the end of its analysis (*id.* at 400), that there may be exceptions to anti-injunction statutes, such as the exception recognized by this Court in *Regan*. The court explicitly noted (*ibid.*), however, that it was "not asked to invoke any such exception to the statutory language," and its decision therefore has no bearing on the argument advanced in the petition.

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[5] As the court of appeals noted (Pet. App. B5 n.2, B9), petitioners' claim (Pet. 20) that there is any distinction between declaratory and injunctive relief for purposes of the bar imposed by Section 1821(j) is foreclosed by this Court's decision in *California* v. *Grace Brethren Church*, 457 U.S. 393, 408-411 (1982).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

---

No. 93-5137
USDC CV 93-904

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES; HISTORIC PRESERVATION LEAGUE, INC., A NON-PROFIT CORPORATION PRESERVATION TEXAS, INC., A NON-PROFIT CORPORATION, APPELLANTS

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION; ANDREW C. HOVE, JR., IN HIS OFFICIAL CAPACITY AS ACTING CHAIRMAN, FEDERAL DEPOSIT INSURANCE CORP., APPELLEES

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[Filed Oct. 21, 1993]

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ORDER

Before: MIKVA, CHIEF JUDGE, WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, AND RANDOLPH, CIRCUIT JUDGES.

Upon consideration of appellants' suggestion for rehearing en banc, the response thereto, the brief of amicus curiae in support of appellants' petition for rehearing en banc, the court's order to show cause filed July 20, 1993, the responses thereto and the reply, it is

ORDERED that the order to show cause be discharged. It does not appear that the controversy is moot. It is

FURTHER ORDERED that the suggestion for rehearing en banc be denied.

Per Curiam

FOR THE COURT:
Ron Garvin, Clerk

By: /s/ Robert F. Bonner
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SEPTEMBER TERM, 1992

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No. 93-5137

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, ET AL., APPELLANTS

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL., APPELLEES

---

[Filed May 15, 1993]

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Before: WALD AND RUTH B. GINSBURG, CIRCUIT JUDGES.

ORDER

Upon consideration of the emergency motion for stay pending appeal, it is

ORDERED that an administrative stay be entered as follows: Appellees are hereby restrained and enjoined from selling, demolishing, or otherwise disposing of the Dr. Pepper headquarters building pending further order of the court. The purpose of

this administrative stay is to give the court sufficient opportunity to consider the merits of the motion and should not be construed in any way as a ruling on the merits of that motion. *See D.C. Circuit Handbook of Practice and Internal Procedures* 39 (1987).

Appellees are directed to hand-deliver and hand-file a response to the motion for stay by 4:00 p.m. on Sunday, May 16, 1993, and appellants are directed to hand-deliver and hand-file any reply by noon on Monday, May 17, 1993.

Per Curiam

/s/ PMW
/s/ RBG/ml

(3)

Supreme Court, U.S.
FILED
DEC 5 1994
OFFICE OF THE CLERK

No. 94-317

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

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NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, ET AL.,

*Petitioners,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORAI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# REPLY MEMORANDUM

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No. 94-317

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES; HISTORIC PRESERVATION LEAGUE, INC.; AND PRESERVATION TEXAS, INC.,

*Petitioners,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
In its Corporate Capacity as an Instrumentality
of the United States,

*Respondent.*

# REPLY MEMORANDUM

As each party recognizes, this case presents the important and unsettled question of whether Congress intended, when it enacted 12 U.S.C. § 1821(j),[1/] to immunize the Federal Deposit Insurance Corporation ("FDIC") from judicial restraint to prevent actions alleged to violate federal law, where no alternative remedy is available,

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[1/] Section 1821(j) provides that "[e]xcept as provided in this section, no court may take any action * * * to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 12 U.S.C. § 1821(j).

and where a denial of equitable relief would completely preclude judicial review of the FDIC's actions. Petitioners' claim is based on the FDIC's violation of the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470f, 470h-2(a), which can only be remedied by equitable relief. The FDIC sold a historic building to a developer intent on razing it and authorized its demolition, without prior compliance with the requirements of the NHPA, and has persuaded the District of Columbia Circuit that the FDIC's actions and, indeed, any future actions that the FDIC may take in violation of the NHPA, should be insulated from judicial restraint.

Under the reasoning of the District of Columbia Circuit in this case, federal courts would not only be powerless to forestall the FDIC's unlawful destruction of historic or natural resources, but would also be prohibited from restraining any unlawful or criminal conduct by the FDIC, even if such conduct creates irreparable consequences for public health and safety, such as "operat[ing] a factory or even a hazardous waste facility" in violation of federal regulations. *National Trust For Historic Preservation v. Federal Deposit Insurance Corp.*, 21 F.3d 469, 471 (D.C. Cir. 1994) (Wald, J. concurring and quoting from prior dissenting opinion). This draconian result is untenable, given the "thundering silence on the part of Congress"[2/] concerning any intent to preclude judicial review in cases like this where no alternative remedy is available.

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[2/] *National Trust for Historic Preservation v. FDIC*, 995 F.2d at 243 (Wald, J., dissenting).

## ARGUMENT

1. The FDIC acknowledges that the District of Columbia Circuit's decision conflicts with the decision of the Fifth Circuit in *Sierra Club, Lone Star Chapter v. Federal Deposit Insurance Corp.*, 992 F.2d 545 (5th Cir. 1993), but argues that the cases are distinguishable. None of the FDIC's distinctions withstand scrutiny, however, and the conflict among the circuits remains unresolved.[3/]

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[3/] While the FDIC acknowledges that its sale of the Dr. Pepper Headquarters Building to Dal-Mac Investment Corporation has not rendered the issues in this petition moot, the FDIC suggests that it "is . . . no longer in a position to comply with any prior consideration and consultation requirements that the NHPA might impose with respect to that sale." Opp. at 7. This statement is incorrect. If the Supreme Court were to conclude that § 1821(j) does not prevent the court from redressing the FDIC's violation of the NHPA, petitioners have already notified the District of Columbia Circuit and the FDIC that they would seek to have the sale of the Dr. Pepper Headquarters Building rescinded, and then require compliance with the NHPA. *Cf. Sierra Club*, 992 F.2d at 548 (acknowledging authority to rescind sale for noncompliance with the National Environmental Policy Act).

Furthermore, where a federal agency has violated environmental and preservation laws, those acting in concert with the agency can be subject to suit because otherwise subversion and circumvention of federal law would be sanctioned. *See, e.g., Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't.*, 446 F.2d 1013, 1027 (5th Cir. 1971). *See also North Oakland Voters Alliance v. City of Oakland*, 1992 WL 367096 (N.D. Cal., No. C-92-0743 MHP, Oct. 6, 1992) (City of Oakland could be sued for a violation of § 106 of the NHPA by the Department of Housing & Community Development). In that regard, on March 15, 1993, the FDIC authorized Dal-Mac, through a power of attorney, to apply for

(continued...)

According to the FDIC, *Sierra Club* merely involved "the FDIC's decision to consent to the sale of an asset held by a private party," while the instant case involves the "actual sale of an asset held by the FDIC itself." Opp. at 10-11. This distinction is insignificant, however, because in both cases the FDIC was acting in its "corporate capacity," 992 F.2d at 549, and that was the important factor in the Fifth Circuit's analysis.[4/]

The FDIC also attempts to distinguish *Sierra Club* on the ground that the FDIC in that case was acting pursuant to its authority under 12 U.S.C. § 1821a(a)(4), rather than 12 U.S.C. § 1823(d)(3)(A), which applies here. The FDIC suggests that the Fifth Circuit might interpret § 1823(d)(3)(A) differently from § 1821a(a)(4) in a future case. Opp. at 10-11. However, the Fifth Circuit in *Sierra Club* addressed *both* § 1823(d)(3)(A) and § 1821a(a)(4), emphasizing their "similar[ities]," and held that *neither* provision "clearly and unambiguously" divests the federal courts of equity jurisdiction, which is the showing required by this Court. *Sierra Club, Lone Star Chapter*, 992 F.2d at 548-50 (citing *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979)).

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[3/](...continued)
a demolition permit for the historic building. Thus, Dal-Mac became the agent of the FDIC at a time when the FDIC had been notified that such an action violated the NHPA.

[4/] "The statutory duties imposed on the FDIC in its corporate capacity . . . generally do not involve the same urgency as when the FDIC acts as a receiver." *Sierra Club, Lone Star Chapter*, 992 F.2d at 550.

Nor does the Fifth Circuit's decision in *Ward v. RTC*, 996 F.2d 99 (5th Cir. 1993), support the FDIC's argument that a conflict exists within the Fifth Circuit, or that the Fifth Circuit has changed its view on this issue. Opp. at 11. Indeed, in *Ward*, the Fifth Circuit explicitly stated that its decision was "consistent" with the decision in *Sierra Club* because *Ward* involved the activities of the RTC as conservator or receiver, while in *Sierra Club* the FDIC was acting in its corporate capacity. 996 F.2d at 104 n.2.[5/] More importantly, the Fifth Circuit specifically distinguished *Ward* from the instant case -- and from *South Carolina v. Regan*, 465 U.S. 367 (1984) -- on the grounds that the plaintiff in *Ward* had an alternative remedy, in the form of an administrative procedure for claiming monetary damages, while the National Trust plaintiffs have no alternative remedy. 996 F.2d at 104.

2. In response to the National Trust's argument that the Circuit's decision is in conflict with decisions of the Supreme Court, the FDIC argues that the Circuit analyzed the legislative history of the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA"), as dictated by *South Carolina v. Regan*, but that the legislative history offered "no evidence" of Congressional intent to provide an

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[5/] Although the Fifth Circuit in *Ward* cited the District of Columbia Circuit's first opinion in the *National Trust* case (at 996 F.2d at 102 n.8, 104), the Fifth Circuit inaccurately assumed that the FDIC in the *National Trust* case was exercising the functions of a receiver, *id.* at 104, when in fact the FDIC was acting in its corporate capacity, as in *Sierra Club*.

alternative remedy for "any and all malfeasance." Opp. at 12.[9]

Instead of applying this Court's strong presumption against the deprivation of judicial review, however, the District of Columbia Circuit essentially flipped the standard on its head in relying on a conclusion that the legislative history of FIRREA provided suggestion of an intent to alleviate the literal bar of § 1821(j) when a plaintiff was left without any remedy. Thus, in the face of acknowledged congressional silence, the District of Columbia Circuit applied a presumption in favor of divesting the courts of equitable jurisdiction, while the Fifth Circuit adopted precisely the opposite approach:

> [T]he court's equity jurisdiction provides an essential safeguard to individual rights against arbitrary government action that cannot be indirectly cast aside.

*Sierra Club, Lone Star Chapter*, 992 F.2d at 550.

Aside from the fact that the Circuit's analysis turned the Supreme Court precedent on its head, the FDIC does nothing to address the direct conflict between the decision below and this Court's decisions in *Bob Jones University v. Simon*, 416 U.S. 725 (1974) (rejecting a due process challenge to the Tax Anti-Injunction Act on the ground that the aggrieved party ultimately had access to judicial review); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991)

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[9] As demonstrated in the petition for certiorari, this statement is incorrect. *See* Petition For Cert. at 17-20.

(jurisdiction-limiting provision of immigration law did not prevent the district court from having jurisdiction); and *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) (Tax Anti-Injunction Act bars declaratory and injunctive relief against state tax collection unless there is "no 'plain, speedy and efficient remedy'" in state courts).

3. The FDIC does acknowledge that the decision of the Circuit results in a potential clash of federal governmental interests between two federal agencies, itself and the Advisory Council on Historic Preservation. Nevertheless, the FDIC states that the accommodation of those interests must be accomplished through means other than litigation. Opp. at 13-14. On the contrary, Congress has already established the mechanism for reconciling and balancing those interests -- the National Historic Preservation Act itself. Congress recognizes that:

> most Federal agencies have a primary purpose other than historic preservation; however, it is reasonable to expect that they also view themselves as multiple resource managers responding to diverse economic, social and environmental concerns--including the concerns of historic preservation.

H. R. Rep. No. 96-1457 at 37, *reprinted in* 1980 U.S.C.C.A.N. 6378, 6400.

The NHPA accomplishes this balancing function both through the composition of the independent Advisory Council on Historic Preservation and through the Section 106

review process. Because the Advisory Council includes representatives of six federal agencies,[7] 16 U.S.C. § 470i(a)(2), (4), the Council functions as a "balanced forum where representatives of various interests can deliberate on policy questions and reach true 'public interest' decisions on historic preservation matters." H. R. Rep. No. 96-1457 at 40, *reprinted in* 1980 U.S.C.C.A.N. at 6403.[8]

The whole purpose of the Section 106 review process is to "accommodate historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts between the two and to help resolve such conflicts in the public interest." 36 C.F.R. § 800.1(b). The procedures implementing the NHPA are designed to be extremely "flexible," *id.* § 800.3(b), in order to accommodate agency needs while ensuring that historic preservation goals are not unduly compromised.[9] The Section 106 regulations encourage federal agencies to reach

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[7] Petitioner National Trust for Historic Preservation is also a member of the Advisory Council, 16 U.S.C. § 470i(a)(8), and brought this action partly in that capacity.

[8] "[T]he Council's decisions on preservation questions that come before the Council represent a public interest determination, that assures that historic preservation needs are satisfactorily balanced with other public policy requirements." H. R. Rep. No. 96-1457 at 43, *reprinted in* 1980 U.S.C.C.A.N. at 6406.

[9] For example, the NHPA encourages agencies to develop special compliance procedures that are tailored to the particular needs of agency programs. See 36 C.F.R. §§ 800.13, 800.15 (Programmatic Agreements and Counterpart Regulations); 16 U.S.C. § 470h-2(a)(2).

agreement on alternatives or mitigation measures that "meet both the needs of the undertaking and preservation concerns." *Id.* § 800.3(a).

Contrary to the FDIC's assertion, Opp. at 13-14, Congress also expressed its clear intention that the accommodation of historic preservation interests under the NHPA be resolved by litigation where necessary, since Congress established a specific private right of action to enforce the NHPA. 16 U.S.C. § 470w-4. That cause of action is intended to remedy, among other things, an agency's refusal to comply with the Section 106 review process. *See, e.g., National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784 (S.D. Ohio 1982).

Ultimately, the question of whether there is a potential clash between the historic preservation concerns of the NHPA and the programmatic mission of the FDIC is a question to be resolved by a court on the merits. Yet no court will have the opportunity to resolve that question on the merits if the Circuit's ruling is allowed to stand. Congress intended that agencies not be allowed to act unilaterally to exempt themselves from Section 106, as the FDIC has attempted to do here. The FDIC's effort to insulate itself from judicial review will result in irreparable injury for which no alternative form of relief is available.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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